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In The

Supreme Court of the United States

October Term, 1994

JOHNSON & HIGGINS OF CALIFORNIA, a California Corporation, DONALD F. REEVES, and ROY J. BERTOLDO,

Petitioners,

v.

STEINER CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

JOHN R. REESE*
ROBERT A. LEWIS
HEATHER A. YOUNG
ROBERT A. BRUNDAGE
Three Embarcadero Center
San Francisco, California 94111
Telephone: (415) 393-2000

DAVID A. GREENWOOD
50 South Main Street, #1600
P.O. Box 45340
Salt Lake City, Utah 84145
Telephone: (801) 532-3333

Attorneys for Petitioners Johnson & Higgins of California, et al.

*Counsel of Record

McCUTCHEN, DOYLE, BROWN & ENERSEN
VAN COTT, BAGLEY, CORNWALL & McCARTHY
Of Counsel

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED FOR REVIEW

ERISA's anti-cutback provisions (29 U.S.C. § 1054(g) and 26 U.S.C. § 411(d)(6)) forbid any pension plan amendment that reduces an employee's accrued benefit. Any amendment that has the effect of eliminating or reducing a retirement-type subsidy or optional form of benefit is treated as reducing an accrued benefit.

I. Is a subsidized lump sum form of pension benefits a "retirement-type subsidy" that cannot be reduced retroactively under the anti-cutback provisions?

II. Do the anti-cutback provisions permit an optional form of pension plan benefit to be reduced retroactively?

PARTIES IN THE COURT BELOW

All parties in the court below are identified in the caption of this petition.[1]

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[1] All subsidiaries of petitioner Johnson & Higgins of California are wholly owned. Petitioner's parent corporation is Johnson & Higgins.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners Johnson & Higgins of California, Donald F. Reeves and Roy Bertoldo (jointly "J&H") respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered on July 7, 1994. That judgment finds that petitioners committed actuarial malpractice by not advising respondent Steiner Corporation ("Steiner") that it could retroactively reduce the pension benefits it had promised and paid its employees for more than 25 years.

OPINIONS BELOW

The unreported Findings of Fact and Conclusions of Law of the United States District Court for the District of Utah were filed January 24, 1992. (Appendix B) The Tenth Circuit's decision entered July 7, 1994 (Appendix A) is reported at 31 F.3d 935. The Tenth Circuit summarily denied J&H's petition for rehearing in an unpublished decision entered on August 9, 1994. (Appendix C)

JURISDICTION OF THIS COURT

The Tenth Circuit's judgment was entered on July 7, 1994. A timely Petition for Rehearing was denied on August 9, 1994. The Court has jurisdiction to review the judgment below by writ of certiorari under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

29 U.S.C. § 1054(g) provides that

> (1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(c)(8) or 1441 of this title.
>
> (2) For purposes of paragraph (1), a plan amendment which has the effect of –
>
> > (A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or
> >
> > (B) eliminating an optional form of benefit,
>
> with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. . . .

26 U.S.C. § 411(d)(6) is the Internal Revenue Code counterpart to § 1054(g).[2] It provides that

> (A) In general. – A plan shall be treated as not satisfying the requirements of this section if the accrued benefit of a participant is decreased by an amendment of the plan, other than an amendment described in section 412(c)(8), or section 4281 of the Employee Retirement Income Security Act of 1974.

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[2] The two subsections are identical in the respects pertinent to this Petition. For convenience, we refer below principally to the Labor Code version.

> (B) Treatment of certain plan amendments. – For purposes of subparagraph (A), a plan amendment which has the effect of –
>
> > (i) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or
> >
> > (ii) eliminating an optional form of benefit,
>
> with respect to benefits attributable to service before the amendment shall be treated as reducing acc[ru]ed benefits. . . .

Treas. Reg. § 1.411(d)-4 A-1(a), which interprets the quoted statutory provisions, provides in pertinent part that

> The term "section 411(d)(6) protected benefit" includes any benefit that is described in one or more of the following categories – . . .
>
> > (3) Optional forms of benefit described in section 411(d)(6)(B)(ii).
>
> Such benefits, to the extent they have accrued, are subject to the protection of section 411(d)(6) and, where applicable, the definitely determinable requirement of section 401(a) (including section 401(a)(25)) and cannot, therefore, be reduced, eliminated, or made subject to employer discretion except to the extent permitted by regulations.

Treas. Reg. § 1.411(d)-3(b), which also interprets the quoted statutory provisions, provides in pertinent part that:

> Under section 411(d)(6) a plan is not a qualified plan . . . if a plan amendment decreases the

> accrued benefit of any plan participant, unless the plan amendment satisfies the requirements of section 412(c)(8). . . . Plan provisions indirectly affecting accrued benefits include, for example, provisions relating . . . to actuarial factors for determining optional or early retirement benefits.

STATEMENT OF THE CASE

Steiner accuses J&H and its actuaries, Donald F. Reeves and Roy Bertoldo, of actuarial malpractice in advising Steiner about its defined-benefit pension plan under the Employee Retirement Income Security Act ("ERISA"). The portion of the case relevant to this Petition stems from the Steiner plan's optional form of benefit: retirees could opt to receive benefits in a single lump sum rather than a monthly annuity payment. (FOF 5, App. B at 2)

Steiner's formal plan document specified that to calculate a lump sum, the annuity payments due an employee upon retirement would be discounted to present value using the interest rate in the most recent valuation of the plan. (Plan § 1.23, App. 215)[3] But in practice Steiner always disregarded that provision. Instead, Steiner always calculated its employees' payments by applying specific discount rates and actuarial

[3] Citations to an appendix other than Appendices A, B and C refer to an appendix filed in the Court of Appeals.

assumptions, recorded in separate tables and a worksheet, to specific periods of the retiree's employment.[4] As the district court found, and the Tenth Circuit assumed, because Steiner from the time the plan was created in 1958 always used the tables and worksheet to calculate the lump sum, the tables and worksheet were part of the plan. (FOF 11, 45, App. B at 4, 15-16; App. A at 10)

The lump sum was more valuable to the employees than the annuity because the layered discount rates Steiner assigned to past years of employment were lower than the market interest rates when employees retired. (FOF 14, App. B at 4) Steiner and its employees were aware of that fact, and Steiner's employees came to rely on the lump sum's subsidy. (FOF 13, 14, 34, App. B at 4-5, 12)

J&H was engaged by Steiner in 1977 to replace the actuary that had provided services to the plan since its creation in 1958. In 1977 and 1978, J&H told Steiner that its method of calculation produced lump sums that were more costly to the plan than if it used market rates and that market rates would produce lump sums approximately equal in value to annuities. (FOF 14, App. B at 4-5) J&H specifically advised Steiner to switch prospectively to a floating market rate, but Steiner rejected J&H's advice. Steiner's chief financial officer said that Steiner employees were relying on the more favorable interest

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[4] The lump sum amount was therefore calculated by applying a 3.5 percent interest rate and a 1951 group mortality table to employee service before 1972; a 4 percent rate and 1951 table to service between 1972 and 1977; and a 6 percent rate and 1971 table for service after 1977. (FOF 10, App. B at 3-4)

rates and that he did not wish to change them. (FOF 15, 16, 34, App. B at 5, 12; App. 23)

In the mid-1980's, changes in ERISA and an IRS ruling required plans to specify the actuarial equivalence factors used to calculate optional benefits, including lump sum payments, to make a plan's calculations non-discretionary and known to the participants. The deadline to specify the factors was October 31, 1985. (FOF 24, App. B at 8)[5] In March 1984, Steiner instructed J&H to amend the plan to conform to the new laws. (Aplt. App. 435, App. 126-27) But Steiner did not want to change the lump sum formula (App. 91) and its Plan Administrator, Daniel Harris, instructed J&H to put the layered-rate formula into the amended plan. (App. 91, 130) Accordingly, J&H did so, and Steiner adopted the amended plan on October 31, 1985. (FOF 26, App. B at 8-9)

The anti-cutback provisions of ERISA forbid any plan amendment that has the effect of eliminating or reducing a retirement-type subsidy or optional form of benefit. 29 U.S.C. § 1054(g)(2). Steiner claimed that (1) until the October 1985 amendments the lump sum subsidy was not part of the plan, and hence could be reduced or eliminated, but (2) after the amendments formally inserted the

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[5] Revenue Ruling 79-90, 1979-1 Cum. Bull. 155 (1979), required that plans specify actuarial assumptions, but the Internal Revenue Service extended the deadline to meet the requirement until October 31, 1985. 26 U.S.C. § 401(a)(25) also required that the assumptions be specified for plan years beginning after December 31, 1984. *See* Retirement Equity Act, Pub. L. 98-397, §§ 301(b), 302(a) (1984).

subsidized formula in the plan, ERISA prohibited reducing or eliminating the subsidy. Despite its earlier rejection of J&H's advice to change the lump sum formula and its own instruction to carry the formula over in the amended plan, Steiner claimed that J&H should have advised it before the 1985 amendments that it could change the lump sum formula to retroactively reduce the payments it had promised its employees. Steiner sought millions of dollars in damages from J&H comprised of the subsidy Steiner had promised for more than 25 years to pay its employees. J&H countered that Steiner already had rejected its advice to change the lump sum discount rates prospectively and, in any event, the subsidized rate scheme was part of the plan even before the 1985 amendments and therefore could not be reduced retroactively. Steiner conceded that if the subsidized rates were part of the plan they could not be altered to reduce the lump sum benefit retroactively. (Steiner Op. Br. on appeal at 3, 11; Reply Br. at 5-6, 10)

After a bench trial, the district court agreed with J&H. It found as a matter of fact that the below-market discount rates used to calculate the lump sum were part of the plan before the 1985 amendment. (FOF 11, App. B at 4) Therefore, even before the 1985 plan amendments, under established law that even Steiner conceded, Steiner could not eliminate or change those layered rates or reduce the subsidized optional benefit they provided. (FOF 45, App. B at 15-16; COL 2, App. B at 17)

The Tenth Circuit reversed in pertinent part. Accepting the district court's finding that the layered rates were part of Steiner's plan, it nevertheless held that ERISA's anti-cutback provisions did not apply. First, it held that

because it was in the form of a lump sum, Steiner's subsidized lump sum benefit could not be a "retirement-type subsidy" protected against reduction or elimination by § 1054(g)(2)(A). (App. A at 12-13) Second, it found that the lump sum was an "optional form of benefit" under § 1054(g)(2)(B), but ruled that optional forms of benefit can be reduced as long as they are not entirely eliminated. (App. A at 12-14) ("only an elimination of the lump sum suffices to reduce accrued benefits for purposes of the statute.")[6] J&H timely petitioned for rehearing, which the Tenth Circuit panel summarily denied. (App. C)

JURISDICTION OF THE DISTRICT COURT

The District Court had jurisdiction founded on diversity of citizenship under 28 U.S.C. § 1332. J&H is a California corporation with its principal place of business in California, and Donald F. Reeves and Roy J. Bertoldo are residents of California. Steiner is a Nevada corporation with its principal place of business in Utah. The other parties in the district court were also diverse.

[6] Ironically, the holding that the lump sum benefit can be cut back negates Steiner's claim. If ERISA does *not* forbid Steiner from cutting back the lump sum benefit, Steiner has not been damaged, and the trial court's judgment for J&H should be affirmed. The Tenth Circuit's reasoning does not support its judgment.

REASONS FOR GRANTING THE WRIT

The decision below broadly holds that ERISA's anti-cutback rules do not apply to protect optional lump sum retirement benefits against retroactive reduction. This holding squarely conflicts with a decision of the Sixth Circuit, and thus creates a circuit split as to the existence of employee rights that lie at ERISA's very core. National uniformity for these rights is critical. The decision also conflicts with the IRS's long-standing interpretation of the anti-cutback provisions, with Congress' intent and with the purpose of ERISA, but furthers no other policy. It needlessly endangers vested pension rights, and even Steiner disagrees with it.[7] The Court should grant certiorari and reverse it.

I. THE COURT OF APPEALS' HOLDING THAT LUMP-SUM RETIREMENT BENEFITS ARE NOT PROTECTED AGAINST REDUCTION OR ELIMINATION CREATES A CONFLICT AMONG THE CIRCUITS.

The Tenth Circuit erroneously found Steiner's lump sum payment is not protected from elimination or reduction

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[7] Steiner admitted on appeal that the lump sum subsidy could not be cut back if it was in the plan:

> Once these actuarial assumptions were specified in the Plan they were subject to the anti-cutback provisions.
>
> [O]nce the actuarial assumptions used to determine optional benefits were specified in a plan, any subsidized optional benefit (such as Steiner's lump sum) could not be taken away.

(Steiner Opening Brief at 3, 11; *see id* at 15; Steiner Reply Brief at 1, 5-6, 10)

under 29 U.S.C. § 1054(g)(2)(A) because it is not a retirement-type subsidy.[8] It reasoned that Steiner's lump sum payment cannot be a retirement-type subsidy because it "is paid out in full at the time of retirement and does not continue thereafter like a subsidy." (App. A at 12) This holding directly conflicts with the Sixth Circuit's holding in *Costantino v. TRW, Inc.*, 13 F.3d 969 (6th Cir. 1994) that a subsidy paid as a lump sum, like Steiner's, is a subsidy protected from retroactive reduction or elimination under § 1054(g)(2)(A). The Tenth Circuit's decision also misreads § 1054 and its interpretive regulations, neither of which says a lump sum payment is not a retirement-type subsidy. Thus, the Tenth Circuit's decision creates a split among the circuits and confounds both law and policy. This Court should review the Tenth Circuit's decision to resolve this divergent law.

The Tenth Circuit cites *Costantino* to support its holding that Steiner's lump sum payment is not protected from reduction or elimination under 29 U.S.C. § 1054(g)(2)(A) because it is paid all at once, rather than as an annuity, and so cannot be a retirement-type subsidy. (App. A at 13) In fact *Costantino* holds the exact opposite. In *Costantino*, defendant's plan originally permitted beneficiaries retiring early to elect either the monthly payments they would have received had they retired at the normal retirement age – which constituted a subsidy because they were "more valuable than monthly payments of the same amount that began at age 65" – or a

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[8] 29 U.S.C. § 1054(g)(2)(A) prohibits a plan amendment from "eliminating or reducing an early retirement benefit or retirement-type subsidy."

lump sum equal to the present value of that annuity, including the subsidy. 13 F.3d at 972. The defendant retroactively eliminated the subsidy for those electing *lump sum* early retirement payments (but not annuities), so that the lump sum represented only the present value of a lifetime annuity beginning at age 65. 13 F.3d at 973. The Sixth Circuit held this violated § 1054(g)(2)(A): "[defendant's amendment] constitutes an elimination of early retirement subsidies for retirees that have already satisfied the pre-retirement conditions for qualifying for the subsidies. Such an elimination is expressly forbidden." 13 F.3d at 977-78.

Thus, far from holding that a lump sum cannot be a protected retirement-type subsidy, *Costantino* explicitly held that a subsidy paid as a lump sum *is* fully protected. That is squarely inconsistent with the Tenth Circuit's decision here, which holds that Steiner's subsidized lump sum benefit could be cut back.[9]

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[9] The Tenth Circuit also reasoned that since Steiner's lump sum payment was an optional form of benefit, it could not also be a retirement-type subsidy. (App. A at 12) ("generally a benefit is either one [optional form] or the other [retirement-type subsidy] but not both.") This reasoning is unsupported by the language of Section 1054(g)(2) and it conflicts with the IRS's own position. Treasury Regulation § 1.411(d)-4 A-2(a)(2) ("This is true even though the participant could have elected to receive an optional form of benefit with a greater actuarial value than the value of the optional form received, such as an *optional form including retirement-type subsidies.*") (emphasis added).

Nor does the legislative history's definition of a retirement-type subsidy as one that "continues after retirement" (App. A at 12) (citing S. Rep. No. 575, 98th Cong., 2d Sess. 30, *reprinted in* 1984 U.S.C.C.A.N. 2547, 2576) support the Tenth Circuit's conclusion that *only* a continuing annuity can be a retirement-type

The Tenth Circuit is wrong and the Sixth Circuit is right. As a matter of policy and common sense, there should be no difference between subsidies paid all at once and over time. Why should it matter for purposes of the anti-cutback rules whether an employee elects to receive the subsidy all at once or in periodic payments? Nothing in any statute or regulation or in the voluminous legislative history suggests it mattered to ERISA's drafters. Indeed, the only persons to whom it does matter are the beneficiaries of plans with optional lump sum payments – many of whom would prefer their subsidies paid in a lump sum rather than by an annuity.[10] If the anti-cutback rules apply only to subsidies paid as annuities and not to lump sum subsidies, beneficiaries will be deprived of promised and preferred retirement benefits. No public policy supports this, and the central purpose of ERISA – to protect beneficiaries' preferred form of retirement benefits from retroactive reduction or elimination – would be thwarted if it were so. *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 375 (1980).

National uniformity is particularly critical to ERISA. One of ERISA's chief purposes was to reduce administrative costs by ensuring that a single plan would be subject to uniform requirements in every state. *Shaw v. Delta*

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subsidy. This language easily embraces a lump sum payment whose amount is calculated as the present value equivalent of a series of annuity payments that continue after retirement. There is no logical reason to exclude such payments and no suggestion anywhere that ERISA's drafters intended to do so.

[10] Both sides' experts testified that given a choice, most participants elect lump sum distribution even in plans that do not subsidize it. (Aplt. App. 98, 124-25, 148-49, 170)

Airlines, 463 U.S. 85, 105 & n.25 (1983); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9-10 (1987). The decision below means that an important form of benefit can be cut back in Denver or Salt Lake City, but not in Cleveland or Phoenix. The Court should grant certiorari to resolve a confusing split among the circuits, and to correct the Tenth Circuit's misinterpretation of existing law.

II. THE COURT SHOULD REVIEW THE JUDGMENT TO CONFIRM THAT OPTIONAL FORMS OF BENEFIT MAY NOT BE RETROACTIVELY REDUCED.

The Court should also review the Tenth Circuit's holding that § 1054(g)(2) permits an employer to reduce an optional form of benefit. (App. A at 13-14) This holding contradicts two Internal Revenue Service regulations, the revenue ruling on which § 1054(g)(2) is based, § 1054(g)(2)'s legislative history, and respondents' own position. It is supported by no reported case and serves no policy. It permits employers to promise generous optional benefits but refuse to deliver after employees have worked for decades in reliance. It violates ERISA's central goal to protect employees' rights to promised retirement benefits.

The Tenth Circuit correctly observed that § 1054(g)(2)(B) states that *elimination* of an optional form of benefit is treated as reducing accrued benefits, but wrongly concluded that therefore such benefits can be *reduced*. (App. A at 13-14) That is a non sequitur and it makes no real-world sense. What sense does it make to say that Steiner lawfully could reduce the value of the lump sum benefit to 0.001, but not to 0.000?

In fact, the statutes do not sanction cutbacks in optional forms of benefit. The Treasury regulations interpreting these sections (to which the courts must defer,[11] *Bob Jones Univ. v. United States*, 461 U.S. 574, 596 (1983) ("this Court has long recognized the primary authority of the IRS and its predecessors in construing the Internal Revenue Code")) plainly state that optional forms of benefit cannot be reduced. One declares that an optional form of benefit is "protected," and "such [protected] benefits, to the extent they have accrued, . . . cannot . . . be *reduced*, eliminated or made subject to employer discretion." Treas. Reg. § 1.411(d)-4 A-1(a) (emphasis added). The Tenth Circuit acknowledged this IRS interpretation, but held it "has no bearing" because the regulation's effective date was January 30, 1986, three months after the October 31, 1985 deadline for amending Steiner's plan. (App. A at 13-14) That misconstrues the nature of administrative interpretation, whose persuasive force comes from its source – the IRS – not from its effective date. The IRS interpreted the statute on January 30, 1986, but that interpretation didn't create the statute's meaning on that date; the statute meant the same thing before the IRS said it.

> The fact that the regulation . . . was promulgated after the offending stock transfers does not change the result. Regulations do not create law; they merely explain existing legislation.

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[11] The Treasury regulations govern interpretation of both the Labor Code and Revenue Code versions of the anti-cutback provisions. 29 C.F.R. § 2530.200a-2.

Charbonnet v. United States, 455 F.2d 1195, 1199 (5th Cir. 1972). Moreover:

> [I]nterpretive regulation is not authority independent of the statute, but is an interpretation of the statute, which, if reasonable, is accepted or deferred to by the courts because it was made by the agency Congress has entrusted with carrying out its purpose.

Caterpillar Tractor Co. v. United States, 589 F.2d 1040, 1043 (Ct. Cl. 1978).

Another Treasury regulation, in force since 1977 – well before Steiner says it would have cut lump sums back – states that "Plan provisions directly or indirectly affecting accrued benefits," such as those "relating . . . to actuarial factors for determining optional or early retirement benefits," affect accrued benefits and cannot be cut back. Treas. Reg. § 1.411(d)-3(b). Congress has amended § 1054(g) three times since this regulation was promulgated without disturbing the regulation. *Cf. United States v. Correll*, 389 U.S. 299, 305-06 (1967) ("Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect of law.") (citation omitted).

The revenue ruling on which § 1054(g)(2) is based, also promulgated before Steiner says it would have cut the lump sums back, says the same thing. "[A]ny amendment to [any] standard for computing actuarial equivalence . . . is subject to section 411(d)(6)." Revenue Ruling

81-12, 1981-1 Cum. Bull. 228, 229 (1981).[12] The ruling offers an example of what is prohibited that is virtually identical to what Steiner says it would have done here:

> A plan providing for optional . . . benefits on an actuarially equivalent basis provides that actuarial equivalence is determined on the basis of a mortality table specified in the plan and a 4% interest assumption. On December 31, 1978, the plan is amended to increase the interest rate from 4% to 5%. [¶] *This amendment is subject to section 411(d)(6) of the Code. The plan must provide some method to preclude a decrease in the optional and early retirement benefits.*

1981-1 Cum. Bull. at 229 (emphasis added).

The House Ways and Means Committee report for § 1054(g)(2) confirms that *both* reduction and elimination of optional forms of benefit are prohibited. "[T]he bill prohibits the elimination *or reduction* of a benefit through a plan amendment that *changes the basis for determining actuarial equivalency* with respect to previously accrued benefits, and prohibits the elimination *or reduction* of an

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[12] Section 1054(g)(2) was intended to codify Ruling 81-12. Explaining the proposed § 1054(g)(2), the House Ways and Means Committee wrote: "[T]he IRS rulings [Revenue Rulings 79-90 and 81-12] relating to actuarial assumptions and cutbacks in accrued benefits provide important protections to plan participants . . . . Therefore, the committee believes these rulings should be codified." Retirement Equity Act of 1984, H.R. Rep. No. 655, Pt. 2, 98th Cong., 2d sess. 25 (1984).

accrued early retirement benefit *or optional form of benefit.*" H.R. Rep. 655 part 2, 98th Cong, 2d Sess. 26 (1984) (emphasis added).[13]

Aside from the legislative history and administrative interpretation, allowing an optional benefit to be cut back, as long as it is not totally eliminated, sabotages ERISA's primary goal. Congress wanted to "mak[e] sure that if a worker has been promised a defined pension benefit upon retirement – and if he has fulfilled whatever

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[13] The Tenth Circuit interpreted 29 U.S.C. § 1002(23) to mean that a lump sum benefit can't be an "accrued benefit" simply because it is not "expressed in the form of an *annual* benefit commencing at normal retirement age." (App. A at 11) (Court's emphasis). That violates the plain language of 26 U.S.C. § 411(c)(3): "an employee's accrued benefit [may] be determined as an amount other than an annual benefit commencing at retirement age." Likewise, Treas. Reg. § 1.411(d)-4 A-1(a) states that optional forms of benefit are "benefits" that may have "accrued" – given that, surely they are "accrued benefits." *See also* Treas. Reg. § 1.411(a)-11(a)(2). And, the IRS interpreted "accrued benefits" under § 1054(g) to preclude reducing actuarial factors for optional benefits, even before the statute explicitly mentioned optional benefits. Rev. Rul. 81-12, *supra.*

Moreover, an "accrued benefit" is an important substantive right whose existence cannot turn on the mere form of how the benefit is to be paid out or how it is *"expressed"* actuarially. Whether the benefit is to be paid out annually, monthly or all at once simply has nothing to do with whether the participant has earned the benefit so that it has "accrued." If the Tenth Circuit's interpretation were correct, participants in a plan whose benefits were expressed in the form of monthly payments – like the Steiner plan – or semiannual or biannual (or any other form except annual) payments could never earn accrued benefits. That would be flatly inconsistent with ERISA's fundamental purpose to preserve the retirement benefits that plan participants earn.

conditions are required to obtain a vested benefit – he will actually receive it." *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 375 (1980); *see* 29 U.S.C. § 1001(a). ERISA must be construed to achieve that purpose. But if an optional form of benefit can be reduced retroactively, employees may work and plan for their retirements in reliance on generous optional payments, only to have them become worthless. There is no good reason to permit that, and it is particularly devastating to employees who accept lower wages in exchange for the generous promised retirement benefit.[14] It is faint solace that the option of a lump sum, however unattractive, technically remains. As noted above, there is no substantive difference between reducing the benefit to 0.001 percent of its former value and eliminating it altogether.

The decision below was patently wrong, and it threatens the pension rights of all workers within the Tenth Circuit. The holding applies not just on the facts of this case, but to any reduction of any optional form of benefit:

> [S]ince the lump sum is an optional form of benefit, Appellant may be said to impermissibly reduce accrued benefits only if it were to *eliminate* the lump sum. . . . Neither ERISA nor the

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[14] That is exactly the situation here. According to Steiner's own chief financial officer, Steiner's employees relied on the lump sum subsidy to make up for otherwise poor compensation; that is why Steiner earlier rejected J&H's advice to switch to market rates. (FOF 16, 34, App. B at 5, 12; App. 23) "Almost all" retiring employees chose the lump sum (FOF 13, App. B at 4), and many employees planned their retirements based on the promised lump-sum formula. (App. 7, 23)

> IRC equates the reduction of an optional benefit with a reduction in accrued benefits . . . .

(App. A at 13) (emphasis in original). The holding thus rules directly that any optional form of benefit can be cut back at will. In the Tenth Circuit, any employee relying on an optional form of benefit is chasing a mirage.

The Court should grant certiorari to make clear what had been clear until this decision: employers cannot unilaterally reduce promised optional forms of pension benefits.

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

JOHN R. REESE*
ROBERT A. LEWIS
HEATHER A. YOUNG
ROBERT A. BRUNDAGE
McCUTCHEN, DOYLE, BROWN
& ENERSEN
Three Embarcadero Center
San Francisco, California 94111
Telephone: (415) 393-2000

DAVID A. GREENWOOD
VAN COTT, BAGLEY, CORNWALL
& McCARTHY
50 South Main Street, #1600
P.O. Box 45340
Salt Lake City, Utah 84145
Telephone: (801) 532-3333
Attorneys for Petitioners

JOHNSON & HIGGINS OF CALIFORNIA
ET AL.

*Counsel of Record

November 7, 1994.

APPENDIX A

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

STEINER CORPORATION RETIREMENT PLAN, Plaintiff, and STEINER CORP., a Nevada corporation, and CAROL S. MCCORMICK, administrator of the Steiner Corporation Retirement Plan, Plaintiffs, Counter-Defendants, Appellants, v. JOHNSON & HIGGINS OF CALIFORNIA, a California corporation, DONALD F. REEVES, and ROY J. BERTOLDO, Counterclaim Defendants, Appellees. STEINER CORP., a Nevada corporation, CAROL S. MCCORMICK, administrator of the Steiner Corporation Retirement Plan, and STEINER CORPORATION RETIREMENT PLAN, Plaintiffs, Counter-Defendants, Appellees, v.	No. 92-4097 On Appeal From The United States District Court For The District Of Utah (D.C. No. 88-C-410 G) No. 92-4106 On Appeal From The United States District Court For The District Of Utah (D.C. No. 88-C-410 G) (Filed Jul. 07, 1994)

JOHNSON & HIGGINS OF CALIFORNIA, a California corporation, DONALD F. REEVES, and ROY J. BERTOLDO,

Defendants, Counter-Claimants, Appellants.

Peter W. Billings, Jr. (Jay B. Bell and John E.S. Robson, with him on the briefs), of Fabian & Clendenin, P.C., Salt Lake City, Utah, for Plaintiffs, Appellants, Cross-Appellees.

Robert A. Lewis, of McCutchen, Doyle, Brown & Enersen, San Francisco, California (John R. Reese and Robert M. Gilhuly, of McCutchen, Doyle, Brown & Enersen, San Francisco, California and David A. Greenwood, of Van Cott, Bagley, Cornwell & McCarthy, Salt Lake City, Utah, with him on the briefs), for Defendants, Appellees, Cross-Appellants.

Before TACHA, SETH, and BRIGHT*, Circuit Judges.

SETH, Circuit Judge.

Appellant Steiner Corporation and other plaintiffs,

*** Honorable Myron H. Bright, United States Circuit Judge for the Eighth Circuit, sitting by designation.**

who are not parties to this appeal, sued Appellees Johnson & Higgins of California and two of its employees, Donald F. Reeves and Roy J. Bertoldo (collectively "J & H"), for professional malpractice and breach of contract, both of which implicated ERISA and the Internal Revenue Code. The crux of Appellant's complaint was that J & H breached its actuarial duties by not properly advising Appellant regarding the redrafting of Appellant's employee retirement plan ("Plan"), by improperly redrafting section 11.2 of the Plan, by not providing Appellant with information that it requested, and by improperly calculating the amount of Appellant's annual contributions to the Plan. J & H counterclaimed for unpaid fees.

After a bench trial before the United States District Court for the District of Utah, the court found that J & H negligently redrafted section 11.2 of the Plan and awarded damages. With respect to the Appellant's other claims, the court found either that J & H had not committed malpractice or the Appellant incurred no damages as a result of any misconduct by J & H. On J & H's counterclaim the court found that the fees at issue were attributable to J & H's negligence and therefore were not recoverable. Both parties appealed the district court's decision.

In its opening brief to this court, Appellant accepted as true the factual findings of the district court as paraphrased below. Appellant established the Plan in 1958 to provide retirement benefits for its employees. The Plan is governed by ERISA and qualifies as a "defined benefit plan" as the term is defined in the Internal Revenue Code ("IRC"). Under the Plan employees are entitled to receive

a monthly annuity as the normal form of retirement benefit. As an alternative to the annuity, the Plan provides employees with the option to select a lump sum distribution.

Throughout the years the Plan was amended several times, but for purposes of our review we are only concerned with the versions of the Plan enacted on January 1, 1978 ("1978 Plan") and on October 30, 1985 ("1985 Plan"). At all times the Plan and other documents provided that the lump sum optional benefit was supposed to be the actuarial equivalent of the annuity. Specifically, actuarial equivalent was defined in section 1.17 of the 1978 Plan as "a benefit having the same value as the benefit which such Actuarial Equivalent replaces."

In 1958 Appellant adopted a formula for calculating the value of the lump sum benefit. Over the life of the Plan, the formula was modified such that it became a layered formula ("Layered Formula"); consequently, calculating a single lump sum payment for a retiree required adding together three separately calculated amounts. Each of these amounts was based upon select actuarial assumptions as applied to an individual's duration of employment with Appellant. For service prior to January 1, 1972, a 3.5% interest rate and a 1951 group morality table were the actuarial assumptions. For service between January 1, 1972 and December 31, 1977, a 4% interest rate and a 1951 group mortality table were used. For service after January 1, 1978, a 6% interest rate and a 1971 group mortality table were the assumptions. These actuarial assumptions that comprised the Layered Formula were not specified in the Plan, but rather they were written as a separate document. If a fluctuating market interest rate,

which is an accurate measure of the effect of inflation on the dollar, were used to calculate the lump sum, the lump sum would have been the real dollar equivalent to a monthly annuity paid over the life of a retiree. However, because the Layered Formula utilized fixed rates, the lump sum was more valuable than the annuity.

In 1977 J & H was hired to replace William M. Mercer, Inc. as the actuary for the Plan. J & H continued to provide actuarial services until 1988 when it was fired by Appellant. As a part of its services, J & H prepared annual actuarial statements that valued the Plan and provided a range of permissible annual contributions that were to be made by Appellant. Although almost all retirees historically opted for the lump sum, J & H evaluated the Plan based on the value of annuities rather than the more valuable lump sum. As a consequence, the Plan valuations substantially understated the value of the benefits and costs that Appellant had incurred.

For most of the time period relevant to this action, F.J. Kane was Appellant's Chief Financial Officer, and Daniel Harris was the Plan Administrator. Collectively, Mr. Kane and Mr. Harris were responsible for the entire operation and maintenance of the Plan, with J & H providing support services such as those mentioned above. Mr. Kane retired in 1984. It is undisputed that Mr. Kane knew that the Layered Formula provided a lump sum that was more valuable than the annuity despite the express language in the Plan that they were to be comparable.

On July 1, 1984, Kevin Steiner replaced Mr. Kane as Chief Financial Officer. The record reflects that unlike Mr.

Kane, Mr. Steiner did not know that the lump sum was more valuable than the annuity. Also, there is no evidence that Mr. Harris informed Mr. Steiner of the disparity between the alternative benefits. Sometime in 1984 the decision was made to amend the Plan because of the enactment of the Retirement Equity Act and other applicable federal laws and regulations. The most important requirement imposed by these enactments was that by October 31, 1985 a qualified plan must specify all of the factors used to calculate the actuarial equivalence of optional benefits so that the calculations would be non-discretionary and known to a plan's participants.

Sometime in February 1985, Mr. Steiner met with representatives of J & H to discuss amending the Plan. Although J & H disputes the following, the record supports the court's finding that Mr. Steiner requested that J & H provide a valuation of the Plan assuming that all retirees opted for the lump sum as opposed to J & H's traditional method of valuating based on the annuity. Although Mr. Steiner made several more requests for this information, J & H did not provide the calculations until after the October 31, 1985 deadline for Appellant to submit its amended Plan for approval. Rather than make the requested calculations or inform Appellant that it could potentially change its Layered Formula when it amended the Plan, J & H submitted a proposed amended Plan for Mr. Steiner's approval that merely incorporated the pre-existing Layered Formula. There were several other modifications made to the Plan that will be discussed later in this opinion. Without reading the proposed amended Plan or any of the previous plans, Mr. Steiner executed the proposed Plan on October 30, 1985.

Early in 1986, J & H finally provided the calculations requested by Mr. Steiner almost a year previously. Based on the calculations, Appellant amended the 1985 Plan in July 1986 so that the lump sum was in fact the actuarial equivalent of the annuity. However, because this amendment was made after October 31, 1985, it applied only to the prospective calculation of benefits accrued after July 1986. Mr. Steiner testified at trial that if J & H had submitted the requested calculations before October 31, then Appellant would have adopted a new formula for calculating the lump sum that would have retroactively affected retirees' benefits such that the lump sum would have been equal to the annuity benefit for anyone retiring after October 31.

Unrelated to the facts surrounding the Layered Formula, the court found that Appellant sold the stock of a subsidiary named Steiner Financial Corporation ("SFC") in 1987. As a result SFC's fourteen employees were transferred and later terminated. Of these fourteen employees, only one was fully vested under the Plan while the other thirteen were not. As a matter of percentages, the SFC employees constituted only 1.6 percent of all Steiner employees, and the thirteen non-vested SFC employees comprised 2.6 percent of Steiner's total non-vested employees.

When J & H revised the Plan in 1985, it rewrote section 17.3 of the 1978 Plan. As originally drafted, section 17.3 provided:

> "In the event of permanent discontinuance of contributions or termination (whole or partial) of the Plan, all Participants for whom the Plan is being discontinued or terminated shall

> be fully vested with respect to benefits to which they would have been entitled had they terminated employment with a fully vested interest as of the date of such discontinuance or termination."

When it drafted the 1985 Plan, J & H replaced section 17.3 with section 11.2 which provided:

> "As to any Employer for which there is a complete discontinuance of contributions, or for which the Plan is terminated or partially terminated, . . . the Participants in its employ . . . [shall be fully vested]."

The court found that Appellant did not want the Plan amended to provide greater rights than required by ERISA. Furthermore, the court found that Appellant incurred $119,000.00 in costs as a result of vesting the previously non-vested thirteen SFC employees when it discontinued making contributions to the Plan. The implication of this holding is that the vesting requirements of section 11.2 exceeded ERISA's mandate and therefore J & H's amendment to the Plan unjustly caused Appellant to vest its former employees.

Based on the facts as summarized above, the district court held:

1. J & H negligently failed to inform Appellant that it may have been possible to change the Layered Formula when Appellant adopted the 1985 Plan, and negligently failed to provide comparative calculations requested by Mr. Steiner in a timely manner.

2. The Layered Formula previously used by Appellant became a part of the Plan by administrative practice,

usage and common consent; therefore, the lump sum actuarial equivalence factors could not be altered to reduce accrued benefits. 26 U.S.C. § 411(d)(6); 29 U.S.C. § 1054(g).

3. Appellant suffered no damages as a result of allegedly making insufficient contributions to the Plan because J & H failed to value the lump sum rather than the annuity, and because payment of additional contributions by Appellant was wholly speculative.

4. J & H negligently redrafted section 11.2 of the 1985 Plan, and Appellant was not contributorily negligent in this regard. Such negligence caused financial injury to Appellant in the amount of $119,000.00, plus interest.

5. J & H's counterclaim for unpaid fees is dismissed because the fees related solely to J & H's negligent conduct.

On appeal, the parties challenge every legal conclusion of the court. Appellant argues (1) that the Layered Formula could have been altered at the time the Plan was amended in 1985, and (2) that the court erred by concluding that it was wholly speculative whether Appellant would have made additional contributions to the Plan if J & H had correctly valued the lump sum in its annual actuarial statements. In its cross-appeal, J & H claims (1) that it did not improperly amend the 1985 Plan to require vesting of SFC employees, and (2) that there is no evidence supporting the court's decision that J & H's counterclaim for fees related exclusively to its own negligence. There are miscellaneous claims that will be expressly dealt with throughout this opinion.

It is well settled that we review the district court's findings of fact under the clearly erroneous test. Salve Regina College v. Russell, 499 U.S. 225. By the same token, we review the court's conclusions of law *de novo.* Estate of Holl v. Commissioner, 967 F.2d 1437 (10th Cir.).

LUMP SUM ACTUARIAL FACTORS: LAYERED FORMULA

As we related in the recitation of the facts, the actuarial factors historically used by Appellant to calculate the lump sum optional benefit were included in a document that was separate and distinct from the Plan document. This is precisely why Appellant had to amend its Plan by October 31, 1985. *See* Rev. Rul. 79-90, 1979-1 C.B. 155; Rev. Rul. 81-12, 1981-1 C.B. 228. The issue we are concerned with is whether Appellant could have changed the actuarial assumptions at the time of amendment in October 1985 to retroactively reduce the lump sum benefit. If so, J & H was under a professional duty to provide Appellant with the necessary information and calculations to permit it to amend the Layered Formula. Although the parties have made numerous and often overly complex arguments relative to this question, we discern that the key lies in the express language of ERISA, the IRC, and related regulations at the time the Plan was amended.

By way of preface, we are assuming for purposes of this appeal that the Layered Formula was in fact a part of Appellant's Plan. Despite J & H's argument to the contrary, the applicable statutes, regulations, and revenue rulings clearly state that only amendments to a plan that

adversely affect accrued benefits are to be restrained. While the parties make numerous arguments concerning the accuracy of such an assumption, we do so because our decision does not depend on whether or not there was a "plan amendment."

In 1985, 29 U.S.C. § 1054(g) provided:

> "(1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan, other than an amendment described in section 1082(c)(8) of this title.
>
> "(2) For purposes of paragraph (1), a plan amendment which has the effect of –
>
> "(A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or
>
> "(B) eliminating an optional form of benefit, with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. . . . "

Internal Revenue Code § 411(6) was essentially for all practical purposes the same as the above quoted ERISA section; thus, for ease of reference we will cite only to 29 U.S.C. § 1054(g). Both sections have been amended over time but with no significant changes.

It is without a doubt that the lump sum is not an accrued benefit as that term is defined in 29 U.S.C. § 1002(23) (accrued benefits are "expressed in the form of an *annual* benefit commencing at normal retirement age. . . . "). (Emphasis Added.) Nor is there any argument that we are dealing with an early retirement benefit. Therefore, our inquiry is whether the lump sum is either

a retirement subsidy or an optional form of benefit such that it may be subject to § 1054(g) (2).

We recently ruled that a lump sum benefit is an optional form of benefit for purposes of § 1054(g) (2). Counts v. Kissack Water & Oil Service, Inc., 986 F.2d 1322, 1324 (10th Cir.). We see no reason to depart from our conclusion in *Counts* by reason of the facts presented herein. *See also* Ross v. Pension Plan for Hourly Employees of SKF Indus., Inc., 847 F.2d 329, 333 (6th Cir.) (optional form of benefit usually involves choice of employees as to how benefit is received); Davis v. Burlington Indus., Inc., 796 F. Supp 866 (E.D.N.C.). Because § 1054(g) (2) distinguishes between optional forms and retirement-type subsidies, we find that generally a benefit is either one or the other, but not both.

Even if a lump sum optional form of benefit could also be a subsidy, such is not the case here. Appellees correctly point out that the Secretary has not yet defined retirement-type subsidy as provided for in the statute. Nevertheless, J & H contends that the lump sum is a subsidy because its value exceeded the annuity's. *See* Bencivenga v. Western Pennsylvania Teamsters, 763 F.2d 574 (3d Cir.); Costantino v. TRW, Inc., 773 F. Supp. 34 (N.D. Ohio). After carefully reviewing these cases, we are not persuaded that they support J & H's position. Furthermore, J & H's contention is contrary to the legislative history, cited in its brief, that defines subsidy as a benefit "continu[ing] after retirement." S. Rep. No. 575, 98th Cong., 2d Sess. 30, *reprinted in* 1984 U.S.C.C.A.N. 2547, 2576. The lump sum benefit at issue is paid out in full at the time of retirement and does not continue thereafter like a subsidy. We therefore conclude that the lump sum

optional benefit is not a retirement-type subsidy. *See* Costantino v. TRW, Inc., 13 F.3d 969 (6th Cir.) (subsidy is a type of benefit specified in the plan as monthly annuities available to early retirees which exceed the annuities for those who retire at a normal retirement age because an early retiree's benefits last longer).

According to the explicit language of § 1054(g)(2), since the lump sum is an optional form of benefit, Appellant may be said to impermissibly reduce accrued benefits only if it were to *eliminate* the lump sum. However, the record is clear that if Mr. Steiner, who was responsible for the administration of the Plan at the critical time in question, October 31, 1985, had known that the lump sum was more valuable than the annuity, then he would have opted to change the actuarial factors to *reduce* the lump sum so that it was equivalent to the annuity. Furthermore, there is no argument by either party nor any evidence suggesting that Appellant ever intended to eliminate the lump sum benefit. Neither ERISA nor the IRC equates the reduction of an optional benefit with a reduction in accrued benefits, and it is only the reduction of accrued benefits that is not permitted by the statutes.

J & H attempts to depart from the express language of the statutes by looking to Treasury Regulation § 1.411(d)-4, *codified at* 26 C.F.R. § 1.411(d)-4. The gist of Appellees' argument is that "eliminating an optional form of benefit" is interpreted under § 1.411(d)-4 as including "reducing" an optional benefit. Even if such an interpretation were accurate, § 1.411(d)-4 A-9(a) provides that "the provisions of this section are effective January 30, 1986." Consequently, § 1.411(d)-4 has no bearing on

this dispute because all of the pertinent activities occurred prior to October 31, 1985.

Appellees also rely on Treasury Regulation § 1.411(d)-3(b), *codified at* 26 C.F.R. § 1.411(d)-3(b), which provides:

> "(b) Prohibition against accrued benefit decrease. Under section 411(d) (6) a plan is not a qualified plan . . . if a plan amendment decreases the accrued benefit of any plan participant. . . . For purposes of determining whether or not any participant's accrued benefit is decreased, all the provisions of a plan affecting directly or indirectly the computation of accrued benefits which are amended with the same adoption and effective dates shall be treated as one plan amendment. Plan provisions indirectly affecting accrued benefits include, for example, provisions relating to years of service and breaks in service for determining benefit accrual, and to actuarial factors for determining optional or early retirement benefits."

This regulation only prohibits the decrease in accrued benefits, which we have already held do not include lump sum payments. The regulation does not say that a change in actuarial factors that reduces optional benefits is prohibited, and we cannot infer such a meaning. Rather, it is more appropriate to read this regulation as conforming to the express language of the statute to which it relates. Again, as we have previously determined, only an elimination of the lump sum suffices to reduce accrued benefits for purposes of the statute. Thus, under the regulation only a change to the actuarial factors

that effectively eliminates an optional benefit will effectuate an impermissible reduction of accrued benefits.

Based on the foregoing, we must conclude that the district court erred when it held that the Layered Formula could not be amended to reduce the lump sum optional benefit at the time Appellant adopted the 1985 Plan. In light of the record and our holding, we further hold that J & H had a duty to provide the lump sum calculations requested by Mr. Steiner and to inform Appellant that it could change the Layered Formula to make the lump sum equivalent to the annuity, and that J & H breached its duty by failing to provide this information by October 31, 1985. However, there still remain the issues of causation and damages; therefore, we REMAND to the district court for further proceedings on these issues. In addition, the merit of Appellees' defenses of laches and contributory negligence must also be decided on remand because the district court's opinion is silent as to these issues and they involve factual determinations that we are unwilling or unable to make.

CONTRIBUTIONS TO PLAN

The district court held that if J & H had annually calculated the value of accrued benefits based on the lump sum, Appellant would have needed to make substantially larger contributions to the Plan. Appellant argues that the court erred by finding that it was "wholly speculative" whether Appellant would have made such contributions because ERISA required plans to be adequately funded and because Appellant was capable of making the additional contributions. Unfortunately for

Appellant, merely because the law requires a certain level of funding and Appellant could have attained that level, does not prove that Appellant would have in fact made the additional contributions. A thorough review of the record does not support the conclusion that the district court's factual findings were clearly erroneous. The trial court's decision of this claim is AFFIRMED.

VESTING

As we recited in the facts, section 11.2 of the 1985 Plan required Appellant to vest employees if for any employer, including a subsidiary like SFC, "there is a complete discontinuance of contributions, or . . . the Plan is terminated or partially terminated." The district court agreed with Appellant that there had been a discontinuance of contributions to SFC in 1987, ostensibly when SFC was sold, and therefore Appellant was required to vest the previously non-vested thirteen SFC employees. The court also concluded that this vesting requirement was based on the language "as to any Employer" which did not appear in the 1978 Plan and was negligently inserted by J & H.

After carefully reviewing the record, we agree with the court that the phrase, "as to any Employer," was not present in the 1978 Plan and potentially increased Appellant's liability beyond the mandate of ERISA, 26 U.S.C. § 411(d) (3). However, we find that the district court clearly erred when it found that the above quoted language caused Appellant to vest the SFC employees.

As a condition to vesting, section 11.2 required either a complete discontinuation of contributions to an

employer or the total or partial termination of the Plan. We first look at the termination issue. Appellant would have us look only at SFC when determining whether or not there was a termination of the Plan. However, this argument is disingenuous in light of Appellant's earlier claim that a termination of a plan must be decided by looking to the plan in its entirety. We hold this to be the better argument, particularly since 26 U.S.C. § 411(d) (3) clearly relates to the effect of a total or partial termination of an entire plan, not the total or partial termination of a portion of a plan. Because Appellant concedes that there is no total or partial termination of the entire Plan, *see* Weil v. Retirement Plan Admin. Comm., 913 F.2d 1045, 1051-52 (2d Cir.) ("significant percentage" of total number of employees must be fired to constitute partial termination of a plan), we must decide whether Appellant carried its burden of establishing that there was a complete discontinuance of contributions for SFC.

Initially, Appellees correctly discern that one of the SFC employees was vested at the time that SFC was sold; therefore, it is argued that there could not be a total discontinuance of contributions because Appellant was required to and in fact did make contributions for this employee. Even though this contention is persuasive, we find that the problem facing Appellant is its utter failure to illicit facts at trial that could support the district court's finding that Appellant had discontinued making contributions. Appellant points us to various passages in the trial transcript to bolster its assertion that the district court was correct, but the cited testimony only states that Mr. Steiner understood that section 11.2 required vesting if there had been a discontinuation and that he "thought

that 11.2 required me to vest the employees." Aplt. Supp. App. at 62. This is not evidence that there was in fact a discontinuation of contributions, but merely is a statement as to Mr. Steiner's state of mind. At best the evidence suggests that Mr. Steiner vested the employees for unexplained reasons. We note that Appellant included in its supplemental appendix to this court a document purporting to show that there was indeed a discontinuation in 1987; however, it is beyond this court to entertain evidence that was not presented to the district court. Without this piece of evidence before the lower court, there were simply no facts alleged that could have supported the district court's finding of discontinuation. Consequently, the district court's holding that J & H owes Appellant $119,000.00, plus interest, based on the vesting of the SFC employees must be REVERSED.

UNPAID FEES

The parties make several arguments relative to the court's denial of J & H's counterclaim for unpaid fees because the fees related exclusively to J & H's negligence. Although we understand the holding of the district court, the court's opinion does not illuminate the factual findings supporting its legal conclusions. We therefore VACATE the court's holding as to this claim and REMAND for clarification.

Accordingly, the decision of the district court is AFFIRMED in part, REVERSED in part, VACATED in part, and REMANDED for proceedings consistent with this opinion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF UTAH – CENTRAL DIVISION

STEINER CORPORATION, CAROL S. MCCORMICK, AND STEINER CORPORATION RETIREMENT PLAN,

Plaintiffs,

vs.

JOHNSON & HIGGINS OF CALIFORNIA, DONALD F. REEVES, AND ROY J. BERTOLDO,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Civil No. 88-C-410G

(Filed Jan. 24, 1992)

This action came on regularly for trial before the court sitting without a jury on October 28-31 and November 4-6, 1991. Peter W. Billings, Jr., Jay B. Bell and John Robson appeared as counsel for plaintiff and Robert A. Lewis, Robert M. Gilhuly and David A. Greenwood appeared as counsel for defendants. Having heard the testimony, examined the other evidence adduced by the respective parties, and heard the arguments of counsel, and this cause having been submitted for decision, the Court now makes and enters its Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Plaintiff Steiner Corporation ("Steiner") is a Nevada corporation with its principal place of business in Salt Lake City, Utah.

2. Defendant Johnson & Higgins of California ("J&H") is a California corporation with its principal place of business in California and at all relevant times was doing business in the State of Utah.

3. Defendants Donald F. Reeves ("Mr. Reeves") and Roy J. Bertoldo ("Mr. Bertoldo") are residents of the State of California and, during the relevant time, were employees of J&H.

4. Steiner has had a "defined benefit plan" as defined by the Internal Revenue Service, which plan has been amended from time to time.

5. Under the Plan, retiring employees are entitled to receive a monthly annuity as the normal form of benefit. As an optional benefit, the retiring employees may receive a lump sum distribution ("lump sum") in lieu of the annuity.

6. Steiner employed William M. Mercer, Inc. ("Mercer") as the actuary for the Plan from 1958 to 1977.

7. In 1977, Steiner hired J&H to replace Mercer as actuary for the Plan. J&H provided actuarial services for Steiner until J&H was terminated in 1988.

8. From prior to J&H's engagement as actuary until July 1, 1984, F.J. Kane ("Mr. Kane") was the Chief Financial Officer of Steiner. From prior to J&H's engagement as actuary until June 1986, Daniel Harris ("Mr. Harris") was

the Plan Administrator. The pension plan was under the jurisdiction of Mr. Kane who acted and was designated as the plan funding manager. Mr. Kane was extremely knowledgeable about the company's pension plan and was responsible through the years for making investments, deciding whether to make maximum or minimum contributions to the Plan, tax planning and determining tax strategies. He was involved in amendments to the Plan, and drafted the 1975 Plan without a lawyer. He would present Plan amendments at Steiner Board meetings. Mr. Harris was hired by Mr. Kane in 1959 as Treasurer and was responsible for pension plan administration starting in 1967. He computed benefits for persons who applied for retirement through the years. Mr. Harris dealt with J&H and gave instructions with the approval of Mr. Kane. He reported to Mr. Kane until Mr. Kane retired for health reasons July 1, 1984. Thereafter, he reported to Kevin Steiner who became Chief Financial Officer at that time. Mr. Kane died in 1988.

9. Steiner adopted a formula which it used since 1958 for calculating the optional lump sum benefit. Steiner chose the discount rates to be used in that calculation, and calculated and paid lump sums to its employees.

10. Prior to 1984, the lump sum was calculated in accordance with tables in Steiner's possession which defined the manner in which the lump sum was calculated. The formula for calculating the lump sum payment consisted of the sum of separately calculated amounts. Each of these amounts was calculated based upon an actuarial formula and the amount of service with Steiner during a particular time period. For service prior to January 1, 1972, a 3½% per annum return on investment and

a 1951 group mortality table was used in the actuarial formula. For service between January 1, 1972 and December 31, 1977, a 4% per annum return on investment and a 1951 group mortality table was used in the actuarial formula. In 1978, the formula was modified to provide that for service after December 31, 1977, a 6% per annum return on investment and a 1971 group mortality table would be used in the actuarial formula.

11. The actuarial formula and the tables which were used in calculating the lump sum benefit became an integral part of the Plan and were used and adopted as such by Steiner over the years.

12. The J&H employees that primarily worked on the Plan were defendants Bertoldo and Reeves. Mr. Bertoldo became less involved in the consulting services provided by J&H after 1978 and Mr. Reeves became primarily responsible for those services. Both Mr. Reeves and Mr. Bertoldo are enrolled actuaries under Subtitle C of Title III of the Employee Retirement Income Security Act of 1974 ("ERISA").

13. Historically, almost all of the retiring Steiner employees elected to take the lump sum benefit instead of the annuity. Plaintiff and defendants were aware of that fact.

14. When J&H was hired by Steiner, the lump sum was more valuable than the annuity because the lump sum was calculated by using interest rates ("layered rates") implicit in the aforesaid tables rather than the prevailing interest rate at the time of retirement. The difference in value was discussed between representatives of J&H and Steiner. The optional lump sum benefit

became substantially more valuable as prevailing interest rates increased after J&H's employment. J&H advised Steiner that the use of prevailing market rates would result in the payment of lump sums approximately equal in value to annuities. J&H also advised Steiner that Steiner's formula for computing lump sum payments utilized discount rates that were below prevailing market rates, and that calculation of lump sums using the below-market discount rates would continue to result in a lump sum that was more valuable to the retiree and more costly to the Plan as compared with payment for an annuity or a lump sum calculated using market interest rates. These facts were well known to Steiner over the years.

15. In 1977 and 1978, J&H recommended that Steiner utilize a market-based interest rate available at the time of retirement for calculating the lump sum, such as the floating market-based interest rate established by the Pension Benefit Guaranty Corporation (PBGC).

16. Fred Kane acting for Steiner refused J&H's advice to change the way it calculated the lump sum. This was the position of Steiner even though the Plan provided that the lump sum would be the "actuarial equivalent" of the annuity and defined "actuarial equivalent" to be a "benefit having the same value as the benefit which the Actuarial Equivalent replaces." Mr. Bertoldo advised Mr. Harris that IRS might challenge the lump sum optional benefit because the purpose of the Plan was to provide continuing benefits. Both Bertoldo and Reeves told Steiner that the lump sum benefit was liberal.

17. For the years 1976 through 1986, J&H prepared and Bertoldo or Reeves signed the annual actuarial statements regarding the Plan which are required by §§ 103 and 104 of ERISA. Each annual actuarial statement provided a range of permissible annual Plan contributions by Steiner. Each annual report also contained a valuation of the plan, including valuation of Plan assets and liabilities, and value of accrued benefits to employees.

18. Defendants calculated the value of accrued benefits based on the value of annuities rather than value of the lump sum benefit. As a result, these valuations substantially understated the value of benefits and costs that Steiner had incurred. If the lump sum benefit calculation had been made and set forth on the assumption that all retirees would elect the lump sum, the value of accrued benefits would have been a substantially higher figure than the calculation based on the value of annuities. Also, if the calculation of the value of accrued benefits had been based on the value of the lump sum benefit the amount that Steiner needed to contribute to the plan each year would have been substantially increased.

19. At the direction of Mr. Kane, defendants prepared a Benefit Adequacy Study for Steiner in 1977 which was used by Steiner to determine whether the benefits under its then-current Plan were appropriate for retiring employees and to determine the effect of adding additional benefits. In preparing the study, defendants did not separately value the lump sum benefit and assumed that the retiring employees would take an annuity, rather than a lump sum. The study compared annuity to annuity of a test group of plan participants who would retire within 10 years. This was done even though all concerned knew

the lump sum was worth more than the annuity. Mr. Kane approved that approach.

20. As part of its services, defendants prepared a "Summary Plan Description" ("SPD") for Steiner employees as required by federal law. Those descriptions are required to be written in a manner easily understood by participants. Among other things, the various SPDs prepared by defendants stated that the lump sum is the "actuarial equivalent of," "mathematically equal to" to "equal in value" to the annuity. This was done with the knowledge of Steiner.

21. Defendants also annually prepared Schedule B to IRS Form 5500 to Steiner's tax return in which the value of accrued benefits was required to be stated. Although the instructions to Schedule B require that each assumption be reasonable solely based on that assumption, in preparing these schedules, J&H assumed that all Steiner employees would elect the annuity, rather than the lump sum. This was done with the knowledge of Steiner.

22. Defendants also prepared individual benefit statements for each of the Plan participants informing them annually of their accrued benefits under the Plan. Defendants always informed the employee of the value of the annuity and never included the value of the lump sum benefit. This was done with the knowledge of Steiner.

23. On July 1, 1984, Kevin Steiner replaced Mr. Kane as Steiner's Chief Financial Officer. Daniel Harris continued on as the Plan Administrator until June 1986.

24. In 1984 and 1985, because of numerous changes in federal pension law, particularly the Retirement Equity Act ("REA"), it became apparent that Steiner was required to amend its Plan. Among other things, federal law and regulations required that a single formula for calculating optional benefits be selected and written into the Plan. This was a new requirement in federal pension law – that the factors used to determine "actuarial equivalence" of optional benefits should become fixed and be written into the Plan. REA and other federal laws and regulations required that all Plan amendments be made no later than October 31, 1985.

25. Prior to October 31, 1985, it was common knowledge in the pension community that under the new federal pension law a plan sponsor could change the factors used to determine optional benefits in the plan in ways that would reduce the benefit otherwise payable under the optional form of benefit attributable to prior service, unless usage and practice in effect rendered administrative writings part of the plan. It was also common knowledge in the pension community that if such optional benefit conversion factors had not become a part of the plan by practice and usage, changes might be possible prior to the October 31, 1985 deadline, but that if such optional benefit conversion factors in effect had become a part of the plan by custom and usage, plan sponsors would be prevented from cutting back benefits which were in effect. Defendants failed to advise plaintiffs prior to October 31, 1985 of these alternative possibilities or that there was uncertainty as to the matter.

26. The Plan was amended on October 31, 1985 to incorporate the previously used formula for calculating

lump sum benefits into the Plan. Kevin Steiner executed the amended Plan on October 30, 1985, in San Francisco, California, one day before the deadline for filing. Mr. Steiner had not read the plan amendments or any of the previous plans prior to execution of the amended plan document on October 30, 1985. The consequence of failing to sign the Plan on or before October 31, 1985, would have been its disqualification. Steiner did not understand the effect of the amendments upon the lump sum conversion factors and did not discover the changes and their significance until after the amendments were effective.

27. In February 1985, Kevin Steiner met with Mr. Bertoldo and Mr. Reeves in San Francisco, California to discuss the Plan. This was their first meeting. During the meeting, Mr. Steiner was told by defendants that the Steiner annuity as the "normal form of benefit," was "adequate, less than average" as compared with other plans sponsored by other companies. It was disclosed that the value of accrued benefits, the liability number reported on Steiner's financial statements, was calculated on the assumption that all retirees would elect the annuity. Mr. Steiner asked whether it would make any difference if it were assumed that all retirees selected the lump sum option rather than the annuity. Mr. Steiner was told that this would have to be calculated, whereupon defendants were requested and they agreed to calculate the value of accrued benefits (or liabilities) on a lump sum basis for comparison and to provide those calculations to Steiner. Kevin Steiner requested that the value of accrued benefits be figured both as to the annuity and the lump sum in the 1984 valuations which J&H was to supply to Steiner later on in 1985.

28. Steiner followed up with defendants more than once after the aforesaid February 1985 meeting, asking for a "ballpark" estimate of liabilities based on the assumption that all employees would elect to take the lump sum. Defendants failed to provide such information or comparative calculations to plaintiffs prior to October 31, 1985.

29. Defendants failed to work up numbers on a lump sum basis in connection with the 1984 valuation report when it was submitted to Steiner in August or September 1985. Had defendants so valued the lump sum benefit or supplied comparative calculations in connection therewith, as had been requested, Steiner could have determined to exclude the past administrative formula for calculating lump sum benefits from the Plan prior to the deadline for filing plan amendment on October 31, 1985. Because of past administrative practice, and the integration of the formula and tables into Steiner's Plan, there was substantial uncertainty in the actuarial community at the time whether such a determination would have violated law which was in effect prior to October 31, 1985, which prohibited such cut back of benefits. However, if J&H had supplied the information before October 31, 1985, Steiner could have attempted to eliminate uncertainty by requesting a revenue ruling relative to the matter.

30. J&H should have known from on and after February 1985 that Steiner might want to make a change in the long time practice of continuing the differential in value of the benefit options. The questions of Kevin Steiner as the new Chief Financial Officer at the February

1985 meeting should have alerted J&H to the possibility that Steiner might want to reconsider the matter.

31. At no time prior to October 31, 1985 did J&H inform Steiner that there were some in the actuarial community who believed that changes could be made so as to lessen the optional benefit if such changes were included in a Plan amendment before October 31, 1985. J&H failed to inform Steiner that some in the actuarial community believed that past usage and practice such as the long time use and practice of Steiner of the administrative formula and tables from which lump sum benefits were calculated would be regarded as part of an employer's plan which could not be cut back or changed retroactively. J&H failed to meet the standard of care in the industry by failing to so inform Steiner and by failing to provide calculations which had been requested as to the comparative value of the lump sum and annuity benefits prior to the deadline date for adoption of plan amendments. Failure to provide such information amounted to conduct below the standard of care in the industry and constituted negligence on the part of J&H.

32. In early 1986, defendants informed Steiner and provided calculations that the value of accrued benefits for 1985 using the lump sum election assumption would be $14,564,243.00 instead of $5,046,536.00 using the annuity election assumption. Prior to this time, Kevin Steiner had not inquired of Mr. Harris how the plan worked or how calculations were made for the lump sum benefit. Nor did he discuss the questions he had about the plan or any substantive pension plan matters with Mr. Kane during the first half of 1985 or at any time prior to his death in 1988. He relied on J&H for the information in question.

33. After Steiner was told in early 1986 that the lump sum was substantially more valuable than the annuity and that the value of accrued benefits would be substantially increased using the assumption that all employees would elect to take the lump sum rather than the annuity, Steiner wanted to change the conversion formula. Steiner informed J&H for the first time that Steiner Corporation did not wish to pay out any further lump sums which were more valuable than the annuity. Defendants told Steiner that all lump sum benefits accrued to date could not be reduced.

34. Steiner knew at all times that the lump sum was more valuable than the annuity. It was apparently regarded by Steiner as part of the compensation package for loyal past service. At all times that Fred Kane was Chief Financial Officer, until he was replaced by Kevin Steiner on July 1, 1984, the existence of such a differential in value was known to him. It was known through the years by Steiner's Plan Administrator Daniel Harris that a significant or liberal differential in value existed in favor of the lump sum over the annuity. The formula and tables used in calculating the lump sum benefit were in the possession of Steiner at all times and Mr. Harris always used those documents in calculating lump sum benefits. The conduct and actions of Steiner employees who were responsible for the pension plan and who interfaced with actuaries through the years was consistent with a practice and usage of the formula and tables as an integral part of the Plan.

35. At and after the time that the full magnitude of the differential was revealed in early 1986, the parties

disagreed as to whether the Steiner formula for calculating lump sum benefits could have been changed retroactively prior to October 31, 1985. However, both parties agreed and recognized that after the October 31, 1985 amendment went into effect, the formula could not be changed retroactively in any manner which would reduce then existing employee accrued lump sum benefits.

36. In July 1986, Steiner amended the Plan to provide that for service after the amendment, the actuarial formula would use a floating interest rate known as the PBGC rate and the 1971 group mortality table. This was the course of action chosen by Steiner in preference to several other alternatives suggested by J&H to adjust the annuity-lump sum value differential. J&H provided various calculations and actuarial projections in connection with the alternatives.

37. In 1987, Steiner sold the stock of a subsidiary named Steiner Financial Corporation (hereinafter "S.F.C."). As a result of such sale, no additional contributions were made to the Plan for the employees of S.F.C., all of which were transferred to another subsidiary, SFC/HAL. SFC/HAL continued to exist but the employees were terminated as part of the sale.

38. The total number of active participants in the Plan at the time of termination was 878 of which 484 were non-vested. The total number of employee participants whose participation was terminated by the sale of S.F.C. was fourteen. Of that fourteen, only one employee had fully satisfied the Plan's vesting requirements. The remaining thirteen participants were not vested under the

Plan. The employer at the time of termination of the said fourteen participants was the subsidiary corporation.

39. The percentage of terminated non-vested SFC employees compared with the total of non-vested Steiner Plan participants was 2.7%. The percentage of terminated SFC employees as compared with the total of all Steiner plan participants was 1.6%.

40. The revised termination provision in the 1985 Plan as written by J&H, Section 11.2, required that when an employer discontinues contributions to the Plan, all of the employees of that employer must become vested. That concept did not exist in the 1978 Plan and was not a requirement of ERISA.

41. The 1978 Plan provided with regard to Plan amendment and termination, as follows:

Section 17:2:

> Any participating company may, by resolution of its Board of Directors, terminate the Plan as it applies to such participating company. . . . If any participating company shall terminate the Plan with respect to itself, such termination shall have the same effect with respect to its active and former participants (other than those whose employment is continued with another participating company) as is provided in Section 17.3 below with respect to termination of the Plan by the company.

Section 17:3:

> In the event of permanent discontinuance of contributions or termination (whole or partial) of the Plan [the entire Plan], all participants for

whom the Plan is being discontinued or terminated shall be fully vested with respect to benefits to which they would have been entitled had they terminated employment with a fully vested interest as of the date of such discontinuance or termination.

42. The 1985 Plan provided, in pertinent part:

> As to any employer for which there is a complete discontinuance of contributions, for which the Plan is terminated or partially terminated, the appropriate share of assets held by the trustee attributable to such employer, and the participants and its employee, shall be nonforfeitable to the extent then funded, and shall be allocated to the extent of the significance of such share of assets and amounts, for the purpose of providing retirement income accrued under the Plan to the date of termination of the Plan for participants and their join or contingent annuitants and beneficiaries which will be payable in accordance with the provisions of the Plan and said trust agreement.

43. Steiner did not want the Plan, as rewritten by J&H in 1985, to provide greater rights for terminated employees than required under law. No one at Steiner requested the change contained in the 1985 Plan as compared with the 1978 Plan, and that change was never discussed by J&H with anyone at Steiner prior to presenting the Plan for Steiner's signature.

44. The cost of Steiner of vesting the employees of SFC was $119,000.

45. Steiner has suffered no damages because of payment to retiring plan participants of the greater valued

lump sum benefit as a result of defendants' failure to value the lump sum benefit. At all pertinent times Steiner knew that the lump sum option was more valuable than the annuity, and at least until February 1985, Steiner had not intimated to J&H that it would consider changing the liberal lump sum option for retiring employees. By that time, because usage and practice over the years the formula and tables for computing the optional lump sum benefit had become an integral part of the Steiner Plan. It was not until early 1986 that Steiner advised J&H of its desire to change or discontinue its longstanding practice of permitting employees upon retirement to choose the more valuable optional lump sum benefit option.

46. Steiner has suffered no demonstrable damage for having failed to contribute more to fund the Plan and thus obtain income tax benefits. Whether Steiner would have made such added contributions is wholly speculative. Plaintiffs failed to sustain the burden of proof that it would have made increased contributions to the Plan, or that it suffered damages for failure to have done so.

47. Steiner has suffered damage as a result of inclusion by J&H of the partial plan termination provision in the 1985 amended and restated plan because the Plan has or will be required to distribute to Steiner Financial employees $119,000 in excess of what would have been required if the provisions in the 1985 Plan written by J&H had not been adopted. Steiner must reimburse the Plan for such excess distribution.

48. Defendants have billed Steiner for services rendered in the amount of $46,975, but those services so provided all stem from or are related to the negligence of

J&H in failure to provide the calculations of comparative value of lump sum versus annuity benefits prior to October 31, 1985.

CONCLUSIONS OF LAW

1. The actuarial formula and tables which were used by Steiner and J&H over the years to calculate lump sum benefits became an integral part of Steiner's Plan by administrative practice, usage and common consent.

2. In 1985, the law did not permit Steiner to amend retroactively its lump sum actuarial equivalency factors to the detriment of any participant. To do so would have reduced the accrued benefits of participants in violation of Internal Revenue Code Section 411(d)(6), 26 U.S.C. 411(d)(6), and ERISA Section 204(g), 29 U.S.C. 1054(g).

3. Steiner has suffered no damages on account of the failure of J&H to value the lump sum optional benefit.

4. J&H fell below the standard of care in the performance of their actuarial duties with respect to its actions concerning the inclusion of section 11.2 in the 1985 amended plan. In this regard, defendants failed to properly advise and consult with Steiner regarding the consequences of the retirement provisions of the 1985 Plan amendments. Steiner was not contributorily negligent in this regard.

5. Steiner has been and will be damaged in that the Plan has or will distribute to Steiner Financial employees $119,000 in excess of what would have been required if vesting of Plan benefits were not required, and Steiner must reimburse the Plan for such excess distributions.

6. J&H has not met its burden of proving that Steiner Corporation and the Plan owe it $46,975 for services rendered. The services become necessary as a result of the negligence of J&H in its failure timely to provide to Steiner promised calculations of the relative value of the optional lump sum benefits as compared with the normal annuity benefit. Steiner has no duty to pay for services which stem from or are related in any way to the negligence of J&H. J&H is estopped to receive payment for such services. Accordingly, the counterclaim should be dismissed.

7. Steiner is entitled to a judgment against each of the defendants, jointly and severally, for $119,000, plus interest.

Counsel for defendants is directed to prepare and lodge with the court within thirty (30) days a form of Judgment consistent with these Findings and Conclusions after compliance with local Rule 536(b). The form of Judgment should be approved as to form by counsel for plaintiffs.

IT IS SO ORDERED.

DATED: January 24, 1992.

/s/ J. Thomas Greene
J. THOMAS GREENE
UNITED STATES
DISTRICT JUDGE

COPIES TO:

United States District Court
for the
District of Utah
January 24, 1992

* * MAILING CERTIFICATE OF CLERK * *

Re: 2:88-cv-00410

True and correct copies of the attached were mailed by the clerk to the following:

Jay B Bell, Esq.
215 South State St., 12th Fl.
P.O. Box 510210
Salt Lake City, UT 84151

David A. Greenwood, Esq.
50 South Main Street #1600
P.O. Box 45340
Salt Lake City, UT 84145

John Edward Hurley Jr, Esq.
MCCUTCHEN, DOYLE, BROWN & ENERSEN
Three Embarcaduo Center
San Francisco, CA 94111

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STEINER CORPORATION RETIREMENT PLAN, Plaintiff, and STEINER CORP., a Nevada corporation, CAROL S. MCCORMICK, administrator of the Steiner Corporation Retirement Plan, Plaintiff-Counter-Defendants-Appellants, v. JOHNSON & HIGGINS OF CALIFORNIA, a California corporation, DONALD F. REEVES, ROY J. BERTOLDO, Counterclaim-Defendants - Appellees.	NO. 92-4097

ORDER
Entered August 9, 1994

Before TACHA, SETH, and BRIGHT,* Circuit Judges.

---

*The Honorable Myron H. Bright, United States Circuit Judge for the Eighth Circuit, sitting by designation.

This matter comes on for consideration of appellee's petition for rehearing.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

Entered for the Court

PATRICK FISHER
Chief Deputy Clerk

By /s/ L. Balzano
Deputy Clerk

SUPREME COURT, U.S.
FILED
DEC 9 1994
OFFICE OF THE CLERK

No. 94-826

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

JOHNSON & HIGGINS OF CALIFORNIA,
a California corporation,
DONALD F. REEVES, and ROY J. BERTOLDO,
Petitioners,

v.

STEINER CORPORATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

PETER W. BILLINGS, JR.
(Counsel of Record)
JAY B. BELL
JOHN E. S. ROBSON
FABIAN & CLENDENIN,
a Professional Corporation
215 South State Street
Twelfth Floor
P.O. Box 510210
Salt Lake City, Utah 84151
(801) 531-8900
Attorneys for Respondent
Steiner Corporation

Washington, D.C. • THIEL PRESS • (202) 328-3286

17 pp

QUESTIONS PRESENTED

In a malpractice case based solely on diversity jurisdiction:

1. Is a lump sum a "retirement-type subsidy" under 29 U.S.C. §1054(g)(2)(A) or is it an "optional form of benefit" under *id.* §1054(g)(2)(B) as the Tenth Circuit held?

2. In ruling on a proposed plan amendment which would have occurred prior to the effective date of Treas. Reg. §1.411(d)-4 A-1(a), did the Tenth Circuit err in holding that 29 U.S.C. §1054(g)(2)(B) prohibited only elimination of a lump sum benefit?

3. Did the Tenth Circuit err in its determination of what actions of the defendant constituted malpractice by assuming that the plaintiff's retirement plan had been amended by "administrative practice, usage and common consent"?

PARTIES IN THE COURT BELOW

All parties in the court below are identified in the caption of the petition. All subsidiaries of respondent are wholly owned except:

American Uniform Company
American Fine Foods
Linco Limited
Linen Supply Italiana
Drolet Saniforme, Inc.
Clean Room Products
Toalheiro Brazil
W/S Interests
Hokatex
Nippon Steiner
Steiner Portugal LOA
Rentex France
Nerite
Sanfresh B.D.

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No. 94-826

IN THE

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OCTOBER TERM, 1994

JOHNSON & HIGGINS OF CALIFORNIA,
a California corporation,
DONALD F. REEVES, and ROY J. BERTOLDO,

Petitioners,

v.

STEINER CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The Respondent, STEINER CORPORATION, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by the Petitioners, JOHNSON & HIGGINS OF CALIFORNIA, DONALD F. REEVES AND ROY BERTOLDO (collectively "J&H").

OPINIONS BELOW

The unreported Findings of Fact and Conclusions of Law of the United States District Court for the District of Utah, the Tenth Circuit's decision reported at 31 F.3d 935 and the Tenth Circuit's denial of J&H's petition for rehearing have all been reproduced in appendices A and B to J&H's Petition for Writ of Certiorari.

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

This petition involves the "anti-cutback" provisions of the Employee Retirement Income Security Act ("ERISA"). The relevant statutes and regulations, 29 U.S.C.A. §1054(g) (1985), 26 U.S.C.A. §411(d)(6) (1988), Treas. Reg. §1.411(d)-4 A-1(a) and Treas. Reg. §1.411(d)-3(b) (as amended in 1985), have been reproduced at pages two through four of J&H's Petition for Writ of Certiorari.

STATEMENT OF THE CASE

This is a malpractice and breach of contract case. Jurisdiction is based solely on diversity of citizenship. Respondent Steiner Corporation ("Steiner") established and annually funded an employee retirement plan ("Plan"). Petitioners were Steiner's consulting actuaries and as such they provided Steiner with plan drafting and design services and annually calculated how much Steiner needed to contribute to the Plan. (FOF 7, 17, 20-22, App. B at 2, 6-7.)

The Plan's "normal retirement benefit"[1] was a monthly annuity based upon the employee's length of service and

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[1] This term is defined in 29 U.S.C.A. §1002(22) (1985).

rate of pay. (Plan §9.1, Aplt. App. at 403-04.)[2] The Plan also gave retiring employees the option of electing to take a lump sum. The lump sum, under the language of the Plan, was supposed to be the "actuarial equivalent" of the annuity. (Plan §9.2, Aplt. App. at 404-05, 407.) "Actuarial equivalent" was defined by the Plan to be a "benefit having the same value as the benefit which the Actuarial Equivalent replaces." (Plan §1.17, Aplt. App. at 395.)

Consistent with the Plan language employees were told that the lump sum was "equal in value" to the annuity. As required under ERISA, each Steiner employee was given a Summary Plan Description ("SPD") which was supposed to describe accurately the benefits in words that an average employee would understand. 29 U.S.C.A. §1022(a)(1) (1985). J&H drafted and Steiner distributed to employees SPDs which described the lump sum as being "equal in value" or "mathematically equal" to the annuity. (FOF 20, App. B at 7.) Like other employees, Steiner's chief executive officer and chief financial officer at the relevant time assumed that the annuity and lump sum were equal in value.[3] (FOF 23, 27, 28, 32, 33, App. B at 7, 9-12; App. A at 5-6.) So apparently did the personnel at J&H who annually

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[2]Citations to an appendix, other than Appendices A, B and C of the Petition for Writ of Certiorari, refer to an appendix filed in the Court of Appelas.

[3]Contrary to Petitioners' implication on page five of their petition, the District Court did not find, and the record does not show, that Steiner employees relied on the layered formula. The evidence was undisputed that employees were never told of the conversion formula or that it was favorable. (Aplt. App. at 209-11, 190-91, 155-56.) To the contrary, employees were affirmatively told in the SPD that the annuity and lump sum were equal in value. (FOF 20, 22, App. B at 7.)

calculated Steiner's contribution since they assumed in making the calculation that all employees would take the annuity. (FOF 18, App. B at 6.)

In fact, the lump sum as actually calculated by the Plan Administrator was not equal in value. Because of the conversion formula used by the Plan Administrator (referred to at trial and by the trial and appellate courts as the "layered formula"), the lump sum was more valuable than the annuity. (App. A at 4-5.) Until October 31, 1985, neither this layered formula nor any other conversion formula was incorporated into or referenced in the Plan. Instead, the Plan gave its actuary (J&H) the discretion to determine the interest rates and other assumptions to convert the annuity to a lump sum. (Plan §1.17, Aplt. App. at 395.)

Steiner's plan was typical of most plans in not specifying the actuarial assumptions to be used in determining "actuarial equivalence" for optional benefits. (Aplt. App. at 114, 116-17, 159, 286-88.) According to uncontested testimony at trial, the Internal Revenue Service ("IRS") became concerned about an employer or its actuary having such discretion because of fear that it might be used to discriminate depending on who was retiring. (Aplt. App. at 110-13.) The IRS, therefore, issued Revenue Ruling 79-90 which required that such actuarial assumptions "be specified within the plan in a manner which precludes employer [or its actuary] discretion." Rev. Rul. 79-90, 1979-1 C.B. 155. For Steiner's plan the effective date for this requirement eventually became October 31, 1985. (FOF 24, App. B at 8.)

Steiner, therefore, needed to amend its plan prior to October 31, 1985 to specify the actuarial assumptions for converting the annuity into a lump sum. Months before this deadline Steiner repeatedly asked J&H for

information which would have revealed to Steiner the cost of continuing to use the layered formula and that the lump sum was not equal in value. (App. A at 6-7.) J&H failed to provide this critical information until March 1986. Nor did J&H advise Steiner that it should consider changing the conversion formula so that the lump sum and annuity would be equal in value. *Id.* Instead, J&H simply incorporated the layered formula in the Plan amendments it prepared for Steiner. The District Court found, and the Tenth Circuit sustained, that J&H was negligent in these failures. (FOF 29, 30, 31, App. B. at 10-11; App. A at 6-8, 15.)

The District Court, however, held that Steiner suffered no damage from this negligence because the layered formula became part of the Plan by "administrative practice, usage and common consent" and, therefore, the conversion formula could not be changed without violating ERISA's anti-cutback provisions. (App. A at 8-9.) On appeal the parties briefed and argued the issue of whether the District Court had erred in holding that the layered formula was already part of Steiner's plan prior to October 31, 1985 because a plan could be informally amended by "administrative practice, usage and common consent." In reversing the District Court, the Tenth Circuit did not reach this issue. It "assum[ed] for purposes of this appeal that the Layered Formula was in fact a part of Appellant's Plan." (App. A at 10.) The Tenth Circuit nevertheless reversed because it held that Steiner's lump sum was neither an "early retirement benefit" nor a "retirement-type subsidy" and that Steiner was not proposing to eliminate an optional form of benefit. (App. A at 13-15.) Therefore, the Tenth Circuit held, the anti-cutback rules would not have prohibited the reduction of the lump sum conversion factors.

SUMMARY OF ARGUMENT

This case presents no issue appropriate for the Court's exercise of its discretionary jurisdiction for several reasons.

First, contrary to Petitioners' assertion, the Tenth Circuit's holding in this case is not in conflict with the decision of the Sixth Circuit in *Costantino v. TRW, Inc.*, 13 F.3d 969 (6th Cir. 1994). While both cases involved a lump sum, the Sixth Circuit was concerned with an "early retirement benefit" whereas the Tenth Circuit was construing the meaning of "retirement-type subsidy." No "early retirement benefit" is at issue in this case. Instead, what the Tenth Circuit held was that Steiner's lump sum option was not a "retirement-type subsidy." The Sixth Circuit did not address the question of whether a lump sum was a "retirement-type subsidy" since the lump sum in *Costantino* was clearly an "early retirement benefit."

Second, the Tenth Circuit's holding is expressly limited to a time period now long since passed. Petitioners cited Treasury Regulation §1.411(d)-4 which construed the prohibitions of ERISA more broadly than the Tenth Circuit did in this case. The Tenth Circuit acknowledged that the regulation interpreted the anti-cutback prohibitions of ERISA to apply to the reduction of an optional benefit as well as to the elimination of an optional benefit, but held that the regulation had no bearing on the dispute since its effective date was after the time period relevant in this case. The Tenth Circuit did not hold that the regulation was invalid or wrong. Thus, even assuming the Tenth Circuit was wrong in its statutory construction, the precedential impact of the holding is extremely limited, most probably to the facts of this case.

Third, the Tenth Circuit's reversal of the District Court was correct for reasons not reached by the Tenth Circuit. The Tenth Circuit agreed with Steiner's position that the anti-cutback prohibitions applied only to plan amendments, but assumed for purposes of the appeal that the District Court was correct in holding that a plan could be informally amended by "administrative practice, usage and common consent." The courts of appeal have consistently held that amendments to plans cannot be made informally.

ARGUMENTS & AUTHORITIES

I.

THE TENTH CIRCUIT'S HOLDING THAT A LUMP SUM IS NOT A "RETIREMENT-TYPE SUBSIDY" DOES NOT CREATE A CONFLICT AMONG THE CIRCUITS.

The petitioners' primary basis for urging the Court to exercise its discretionary jurisdiction is their claim that the Tenth Circuit's holding is at odds with a single case. That case, *Costantino v. TRW, Inc.*, 13 F.3d 969 (6th Cir. 1994), is not in conflict with the Tenth Circuit's holding, and in fact was cited by the Tenth Circuit in support of its holding. (App. A at 12-13.)

It is true that both cases involved a lump sum. The facts and holding of each case, however, involved different issues and different language in the ERISA anti-cutback provisions. Section 1054(g)(2)(A) of 29 U.S.C. prohibits "eliminating or reducing" two distinct benefits: "an early retirement benefit" and "a retirement-type subsidy."[4] 29 U.S.C.A. §1054(g)(2)(A) (1985). In *Cos-*

---

[4] Section 1054(g) provides that

(1) The accrued benefit of a participant under a plan may not be decreased by an amendment of the plan,

[footnote continued]

tantino the employer amended its plan to reduce the early retirement benefit for those electing lump sum. This clearly violated the statute since the statutory language expressly forbids elimination or reduction of early retirement benefits. *Costantino*, 13 F.3d at 977-78. The Sixth Circuit did not need to decide, and did not decide, whether a lump sum which was not an "early retirement benefit" was nevertheless a "retirement-type subsidy." This was, however, the question before the Tenth Circuit.

Moreover, the involvement of a lump sum was incidental to the Sixth Circuit's holding. A careful reading of *Costantino* reveals that the subsidy was not in the conversion formula as was the case with the Steiner plan. Instead, the subsidy considered by the Sixth Circuit was in the early retirement benefit. *Id.* a 973.[5] That is, the same lump sum conversion formula was used whether the retirement was early or at the normal age, but under

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other than an amendment described in section 1082(c)-(8) or 1441 of this title.

(2) For purposes of paragraph (1), a plan amendment which has the effect of –

(A) eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations), or

(B) eliminating an optional form of benefit,

with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. . . .

29 U.S.C.A. §1054(g)(1985).

[5]The employer in *Costantino* first amended to provide that early retirees electing the lump sum received no subsidy *and* the conversion factor used was the Moody's interest rates which resulted in a smaller lump sum. *Costantino v. TRW, Inc.*, 13 F.3d 969, 972 (6th Cir. 1994). Later the employer amended the plan again to use to proper conversion rates, but used the unsubsidized annuity as the basis for computing the lump sum for early retirees. *Id.* at 973.

the amendment the employer applied the formula to the unsubsidized early retirement annuity. *Id.* For example, if an early retiree's subsidized annuity was $1000 per month and the unsubsidized annuity was $750 per month (the amount which results in the earlier and longer aearly retirement annuity to be equal in value to the $1000 normal retirement annuity), the plan as amended used $750 to calculate the lump sum. Prior to amending the plan in *Costantino,* the employer had used the subsidized annuity as the starting point for calculating the lump sum for early retirees. That is why the Tenth Circuit cited the facts in *Costantino* as an example of a subsidy being

> a type of benefit specified in the plan as monthly annuities available to early retirees which exceed the annuities for those who retire at a normal retirement age because an early retiree's benefits last longer.

(App. A at 13.)

The Steiner lump sum had nothing to do with either an early retirement benefit or a subsidized annuity, and therefore, was factually distinct from *Costantino.*

II.

THE COURT SHOULD NOT EXERCISE ITS DISCRETIONARY JURISDICTION BECAUSE THE TENTH CIRCUIT'S HOLDING IS LIMITED TO THE UNIQUE FACTS OF THIS CASE.

The second basis Petitioners urge for exercise of the Court's discretionary jurisdiction is that the Tenth Circuit's holding is contrary to an Internal Revenue Regulation which prohibits elimination *or reduction* of an optional form of benefit. *See* Treas. Reg. §1.411(d)-4 A-1(a).

It is true that the Tenth Circuit strictly construed Section 1054(g)(2) of Title 29 by noting that the statute prohibited only *elimination* of an optional form of benefit, whereas the statute prohibited either elimination or reduction of "retirement-type subsidies." (App. A at 11-13.) It is also true that Treas. Reg. §1.411(d)-4 A-1(a) construes the statute more broadly by prohibiting either elimination or reduction of optional forms of benefit. The Tenth Circuit, however, acknowledged the regulation but held that since its effective date was after October 31, 1985 it "has no bearing on this dispute." (App. A at 13-14.) The Tenth Circuit did not hold that the regulation was invalid or wrong.

Thus, the Tenth Circuit's holding is limited to the unique facts of an employer attempting to change a lump sum conversion formula before the January 30, 1986 effective date of Treas. Reg. §1.411(d)-4. The lump sum conversion formula must further be one that subsidizes the lump sum over the annuity. Almost nine years have passed since the Treasury regulation went into effect. It is very unlikely, therefore, that the Tenth Circuit's holding on reducing optional forms of benefit, even if wrong, would have any precedential effect justifying exercise of the Court's discretionary jurisdiction.[6]

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[6]The Petitioners also argue that the Tenth Circuit's decision is in conflict with Treasury Regulation §1.411(d)-3(b) (as amended in 1985). However, Petitioners' selective quotation of the Regulation leads to a misconstruing of its intent. When analyzed in full context, as was done by the Tenth Circuit (App. A at 14), this Regulation does not prohibit the decrease of an optional benefit. Instead, it gives guidance as to when plan amendments are to be aggregated in applying the anti-cutback rule. It states that "[f]or purposes of determining whether or not any participant's accrued benefit is decreased, all the provisions of a

[footnote continued]

III.

THE TENTH CIRCUIT'S REVERSAL SHOULD BE UPHELD ON THE GROUNDS THAT A QUALIFIED PLAN CANNOT BE INFORMALLY AMENDED BY "ADMINISTRATIVE PRACTICE, USAGE AND COMMON CONSENT".

For purposes of appeal, the Tenth Circuit assumed the primary issue on appeal – whether a plan could be informally amended by "administrative practice, usage and common consent." (App. A at 10-11.) Had the Tenth Circuit reached this issue it would have been compelled to reverse the District Court in any event. ERISA requires that "[e]very employee benefit plan shall be established and maintained pursuant to a *written instrument.*" 29 U.S.C.A. §1102(a)(1) (1985) (emphasis added). The layered formula was not amended into Steiner's plan pursuant to the formal amendment process until October 31, 1985. (Aplt. App. at 415.) Courts have consistently held that qualified plans cannot be modified orally or informally even when (unlike the facts in this case) employees have relied upon the informal amendments. *E.g., Elmore v. Cone Mills Corp.*, 23 F.3d 855, 861 (4th Cir. 1994); *Miller v. Coastal Corp.*, 978 F.2d 622, 625 (10th Cir. 1992), *cert. denied*, ___ U.S. ___ , 113 S.Ct. 1586, 123 L.Ed.2d 152 (1993); *Confer v. Custom Eng'g Co.*, 952 F.2d 41, 43 (3d Cir. 1991); *Bellino v. Schlumberger Technologies, Inc.*, 944 F.2d 26, 33 n.8 (1st Cir. 1991); *Straub v. Western Union Tel. Co.*, 851 F.2d 1262, 1265 (10th Cir. 1988); *Nachwalter v. Christie*, 805 F.2d 956, 959-61 (11th Cir. 1986).

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plan affecting directly or indirectly the computation of accrued benefits [i.e., an optional benefit] which are amended with the same adoption and effective dates shall be treated as one plan amendment." *Id.* This regulation does not change the requirement for an "accrued benefit". Neither the Reguation nor the case law provide that a lump sum option is such an "accrued benefit."

CONCLUSION AND PRAYER

This case does not present a conflict among the circuits. The Tenth Circuit's holding is limited to the unique facts of the case which are very unlikely to be repeated due to the subsequent effective date of an Internal Revenue Service regulation. Moreover, even if the basis for the Tenth Circuit's holding was wrong, the right result was obtained. Steiner Corporation, therefore, prays that the Court deny the Petition for Writ of Certiorari because the case presents no issue appropriate for the Court's review.

Respectfully submitted,

PETER W. BILLINGS, JR.
JAY B. BELL
JOHN E. S. ROBSON
FABIAN & CLENDENIN,
a Professional Corporation
215 South State Street
Twelfth Floor
P.O. Box 510210
Salt Lake City, Utah 84151
(801) 531-8900

Attorneys for Respondent
Steiner Corporation

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In The

Supreme Court of the United States

October Term, 1994

JOHNSON & HIGGINS OF CALIFORNIA, a California Corporation, DONALD F. REEVES, and ROY J. BERTOLDO,

Petitioners,

v.

STEINER CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JOHN R. REESE*
ROBERT A. LEWIS
HEATHER A. YOUNG
ROBERT A. BRUNDAGE
Three Embarcadero Center
San Francisco, California 94111
Telephone: (415) 393-2000

DAVID A. GREENWOOD
50 South Main Street, #1600
P.O. Box 45340
Salt Lake City, Utah 84145
Telephone: (801) 532-3333

Attorneys for Petitioners Johnson & Higgins of California, et al.

*Counsel of Record

McCUTCHEN, DOYLE, BROWN & ENERSEN
VAN COTT, BAGLEY, CORNWALL & McCARTHY
Of Counsel

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTRODUCTION

Respondent Steiner Corporation does not deny that, until the Tenth Circuit's decision here, the law has always been clear that ERISA's anti-cutback provisions forbid an employer from amending a pension plan to reduce or eliminate a beneficiary's retirement-type subsidy or optional form of benefit. Indeed, that has been Steiner's own position throughout the case. The Tenth Circuit's contrary decision creates a circuit conflict in an area that this Court repeatedly has held requires uniformity, throws doubt on the validity of Internal Revenue Service regulations, and exposes pension beneficiaries in the Tenth Circuit to reduction of their retirement benefits.

Steiner never comes close to saying the Tenth Circuit got it right. Instead, it distances itself as much as possible from what the court did. As a result, Steiner's brief in opposition relies on purely technical arguments, never once defending the Tenth Circuit's analysis or holding.

Steiner's brief in opposition therefore only reconfirms the need for this Court's review. This Court should act to correct the Tenth Circuit's error and clarify ERISA law on this crucial issue.

I. THE COURT OF APPEALS' HOLDING THAT LUMP SUM RETIREMENT BENEFITS ARE NOT PROTECTED AGAINST REDUCTION OR ELIMINATION CREATES A CONFLICT WITH THE SIXTH CIRCUIT

Steiner tries to argue that the Sixth Circuit's holding in *Costantino v. TRW, Inc.*, 13 F.3d 969 (6th Cir. 1994) – that

a subsidy paid as a lump sum is a retirement-type subsidy that *cannot* be reduced or eliminated under 29 U.S.C. § 1054(g)(2)(A) – is not really in conflict with the Tenth Circuit's holding here because of two purported factual distinctions. But neither of these "distinctions" is supported by the language of the opinions or the law. *Costantino's* holding is squarely inconsistent with the Tenth Circuit's. This Court should grant certiorari to resolve the split.

Steiner first contends that *Costantino* is distinguishable because the lump sum subsidy at issue there was an early retirement benefit rather than a retirement-type subsidy. Resp. Brief in Opp. at 8. That is just wrong – the subsidy at issue in *Costantino* was a retirement-type subsidy. *Any* payment in excess of the actuarial equivalent of "normal" retirement benefits under a plan is a retirement-type subsidy, whether paid at early retirement or at age 65. *See* Rev. Rul. 85-6, 1985-1 Cum. Bull. 133 (1985) (benefit available before normal retirement age that exceeds actuarial equivalent of normal retirement benefit is retirement-type subsidy); *Ashenbaugh v. Crucible, Inc. 1975 Salaried Retirement Plan*, 854 F.2d 1516, 1521, 1527 (3rd Cir.), *cert. denied*, 490 U.S. 1105 (1989) (subsidized early retirement benefits are retirement-type subsidy); *see also* S. Rep. No. 575, 98th Cong., 2d Sess. 28 (1984), *reprinted at* 1984 U.S. Code Cong. & Admin. News 2547, 2574.

The benefit at issue in *Costantino* was a lump sum offered at early retirement that was more valuable than the actuarial equivalent of normal retirement benefits. It was precisely that subsidy – undeniably a retirement-type

subsidy because it exceeded the "normal" retirement benefit – that the *Costantino* defendant impermissibly eliminated. *Costantino*, 13 F.3d at 977-78. *Costantino* thus holds that a subsidized lump sum benefit payment is a retirement-type subsidy that cannot be reduced or eliminated under Section 1054(g)(2).[1] That directly conflicts with the Tenth Circuit's holding that a lump sum payment can never be a protected retirement-type subsidy.

Steiner also attempts to distinguish *Costantino* by arguing that the Tenth Circuit's holding is limited to subsidies created by applying inflated conversion formulae to nonsubsidized annuities, while the subsidy at issue in *Costantino* was derived by calculating the present value of a subsidized annuity. Resp. Brief in Opp. at 8-9. This "distinction" is directly refuted by the language of the Tenth Circuit's opinion, which plainly says that Steiner's lump sum payment was not a retirement-type subsidy *because it was a lump sum payment*, not because it was derived by an inflated conversion method:

> The lump sum benefit at issue is paid out in full at the time of retirement and does not continue thereafter like a subsidy. We therefore conclude that the lump sum optional benefit is not a retirement-type subsidy.

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[1] Even the Tenth Circuit recognized that *Costantino* involved a retirement-type subsidy; it just read the decision wrong. It cited *Costantino* to support its holding that a "subsidy is a type of benefit specified in the plan as monthly annuities . . . which exceed the annuities for those who retire at a normal retirement age. . . . " App. A at 12-13. But *Costantino* protected a subsidy paid as a lump sum, not an annuity.

App. A at 12. *Costantino*, on the other hand, recognized that a subsidy paid as a lump sum *was* a retirement-type subsidy. The conflict is direct and clear.[2]

As ERISA law now stands, the Sixth and Tenth Circuits tell retirement plans and their beneficiaries two conflicting things: that retirement-type subsidies, including preferred lump sum payments, cannot be reduced in the states comprising the Sixth Circuit; in the states comprising the Tenth Circuit they can. Certiorari is warranted.

II. THE COURT SHOULD REVIEW THE JUDGMENT TO CONFIRM THAT OPTIONAL FORMS OF BENEFIT MAY NOT BE RETROACTIVELY REDUCED

Steiner concedes that the Tenth Circuit "strictly construed" Section 1054(g)(2) – as prohibiting only elimination but not reduction of optional forms of benefit – inconsistently with Treasury Regulation § 1.411(d)-4, which prohibits both elimination and reduction. Resp. Br. in Opp. at 10. Steiner does not even try to defend the Tenth Circuit's "strict construction." Rather, it claims the "strict construction" applies only to the time period before the effective date of the conflicting Treasury Regulation and, therefore, that the Tenth Circuit decision is

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[2] Moreover, Steiner's purported distinctions are so convoluted as to require review even if they were correct. It would be absurd – and unacceptable – for important retirement benefits to turn on the kind of contortions Steiner does in its effort to reconcile the decision below with *Costantino*.

limited to the unique facts of this case.[3] That may be Steiner's wishful thinking, but such a limitation cannot be found in the text of the Tenth Circuit's opinion or in its reasoning.

Nothing in the opinion says or even suggests that the Tenth Circuit's strict construction of § 1054(g)(2) applies only to a past time period or the facts of the case.[4] The language is couched in the present tense:

> According to the explicit language of § 1054(g)(2), since the lump sum is an optional form of benefit, Appellant may be said to impermissibly reduce accrued benefits only if it were to *eliminate* (emphasis in original) the lump sum . . . . Neither ERISA nor the IRC equates the reduction of an optional benefit with a reduction in accrued benefits, and it is only the reduction of accrued benefits that is not permitted by the statutes. (App. A at 13) (emphasis supplied)

And again, when the Tenth Circuit discusses the relationship of Treasury Regulation § 1.411(d)-3(b) to Section 1054(g)(2):

> Rather, it is more appropriate to read this regulation as conforming to the express language of the statute to which it relates. Again, as we have previously determined, only an elimination of the lump sum suffices to reduce accrued benefits for purposes of the statute. Thus, under the

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[3] Steiner completely ignores Revenue Ruling 81-12, 1981-1 Cum. Bull. 228, 229 (1981), which also prohibits reducing an optional form of benefit and on which § 1054(g)(2) is based.

[4] That the Tenth Circuit chose to publish its opinion also indicates it did not believe its views on § 1054(g)(2) are limited to a time period in the past or to the facts of this case.

> regulation only a change to the actuarial factors that effectively eliminates an optional benefit will effectuate an impermissible reduction of accrued benefits. (App. A at 14-15) (emphasis supplied)

Thus, from the face of the opinion, the Tenth Circuit's "strict construction" applies to the present, not just the past, and to any form of optional benefit, not just a subsidized lump sum.

Nor does the Tenth Circuit's reasoning support Steiner's claim that the "strict construction" of § 1054(g)(2) is limited to a past time period or the facts of this case. The Tenth Circuit bases its "strict construction" on what it calls the "explicit" (App. A at 13) and "express" (App. A at 14) language of the statute. That language did not change when the conflicting Treasury Regulation § 1.411(d)-4 became effective. Nothing in the Tenth Circuit opinion suggests that Treasury Regulation § 1.411(d)-4 can override the "explicit" and "express" language of the statute, and give it a radically different meaning. Nor could it. That would be inconsistent with law holding that regulations do not create law, but merely explain existing legislation. *Charbonnet v. United States*, 455 F.2d 1195, 1199 (5th Cir. 1972).

Despite Steiner's assertion that the Tenth Circuit did not hold that Treasury Regulation § 1.411(d)-4 is invalid or wrong, that is the clear import of the Tenth Circuit's reasoning, which refused to accept the specific prohibition in § 1.411(d)-4 against "reducing" an optional form of benefit:

> J&H attempts to depart from the express language of the statutes by looking to Treasury

> Regulation § 1.411(d)-4 . . . . Even if such an interpretation were accurate . . . . (App. A at 13)

And later in its opinion, the Tenth Circuit comes right out and says "it is more appropriate to read" a treasury regulation

> as conforming to the express language of the statute to which it relates. Again, as we have previously determined, only an elimination of the lump sum suffices to reduce accrued benefits for purposes of the statute. (App. A at 14)

According to the language of the opinion, employers in the Tenth Circuit are free under ERISA to reduce optional forms of benefits promised their employees by any amount, just so long as they are not completely eliminated. At the very least, the Tenth Circuit's "strict construction" based on the "explicit" and "express" language of the statute creates severe doubt about the validity of Treasury Regulations §§ 1.411(d)-4 and 1.411(d)-3(b) and puts into question whether optional forms of benefit are protected.

This Court should grant certiorari to make clear what had been clear until the Tenth Circuit decision: that employers cannot reduce promised optional forms of pension benefits.

III. THE CONCEDEDLY ERRONEOUS DECISION CANNOT AVOID REVIEW ON THE THEORY THAT STEINER THINKS IT SHOULD HAVE PREVAILED ON OTHER GROUNDS

Finally, Steiner argues that certiorari should be denied because Steiner believes it could have prevailed

on other grounds. Steiner claims that until the 1985 amendments the lump sum conversion formula was not part of the plan and could have been cut back at will. Resp. Br. in Opp. at 11-12. The District Court rejected this argument, and the Tenth Circuit assumed the District Court was right.

Steiner cites cases holding that an individual misrepresentation in counseling plan participants does not bind the plan if the representation conflicts with the plan's actual terms. But that is not the situation here. Steiner seeks to escape not a slip of the tongue, but its chosen and unbroken practice in paying lump sum benefits it promised its employees for more than a quarter of a century. This practice was memorialized in documents that everyone concerned treated as part of the plan. In these circumstances, the lump sum formula was part of the plan, and the District Court was clearly correct. *See, e.g., Horn v. Berdon, Inc. Defined Benefit Pension Plan*, 938 F.2d 125, 127 (9th Cir. 1991) (document formed part of plan even though not formally labeled as such); *Huber v. Casablanca Indust., Inc.*, 916 F.2d 85, 105-06 (3d Cir. 1990) (document approved by trustees was part of plan even though not executed), *cert. dismissed*, 113 S. Ct. 1070 (1993); *see also Lutheran Med. Center v. Contractors Health Plan*, 25 F.3d 616, 618 (8th Cir. 1994) ("[T]he record shows the Plan has paid benefits to assignees for several years . . . . Because the Plan's actual practice is not in conformity with its strict anti-assignment provision," assignment was valid); *Petrella v. NL Industries*, 529 F. Supp. 1357, 1362 (D.N.J. 1982) (though plan's language did not provide for severance pay, consistent practice of granting it would make it part of plan).

The Tenth Circuit's decision stands for principles that are clearly wrong – so wrong that even Steiner will not defend them on their merits. Even if there existed an alternative factual basis for reaching the Tenth Circuit's result – and none exists here – it would not mitigate either the conflict and uncertainty created in ERISA law by the Tenth Circuit's published opinion or the need to review it.

CONCLUSION

A writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

JOHN R. REESE*
ROBERT A. LEWIS
HEATHER A. YOUNG
ROBERT A. BRUNDAGE
McCUTCHEN, DOYLE, BROWN
& ENERSEN
Three Embarcadero Center
San Francisco, California 94111
Telephone: (415) 393-2000

DAVID A. GREENWOOD
VAN COTT, BAGLEY, CORNWALL
& McCARTHY
50 South Main Street, #1600
P.O. Box 45340
Salt Lake City, Utah 84145
Telephone: (801) 532-3333

Attorneys for Petitioners Johnson & Higgins of California, et al.

*Counsel of Record

December 22, 1994.